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No. 97 ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal government, having entered into fixed-price contracts to sell certain services, may subsequently enact legislation that imposes additional costs—incurred by the government in providing those services—predominantly on the purchasers under the previous fixed-price contracts?

2. May Congress impose retroactive financial liability on companies based solely on the fact that they purchased government services as much as thirty years ago?

RULE 29.6 STATEMENT

The parent companies of Petitioner Yankee Atomic Electric Company are:

New England Power Company
The Connecticut Light and Power Company
Boston Edison Company
Central Maine Power Company
Public Service Company of New Hampshire
Western Massachusetts Electric Company
Montaup Electric Company
Central Vermont Public Service Corporation
Commonwealth Electric Company
Cambridge Electric Light Company

Petitioner has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Yankee Atomic Electric Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-31a) is reported at 112 F.3d 1569. The opinion of the Court of Federal Claims (App. 33a-43a) is reported at 33 Fed. Cl. 580.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. The court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on August 15, 1997. (App. 44a-45a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The relevant provisions of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, are set forth in the Appendix to this petition. App. 46a-48a.

STATEMENT

In enacting the Energy Policy Act of 1992 ("EPACT"), Congress imposed a monetary assessment falling primarily upon nuclear utility companies that previously had contracted with the government to purchase uranium enrichment services. The assessment is earmarked to pay costs the government incurred in performing those enrichment services contracts.

As a result, Petitioner Yankee Atomic Electric Company ("Yankee") is now required to pay the government $15 million *more* than it previously paid under fixed-price contracts for the same government enrichment services. In the aggregate, over a fifteen-year period, EPACT requires Yankee and other nuclear utilities to make "special assessment" payments of more than $2 billion.

This case involves a challenge to EPACT's special assessment as a violation of Yankee's fixed-price contract rights and of Fifth Amendment due process principles. The Court of Federal Claims held that the Act was "an impermissible exercise of sovereign power." App. 41a. A divided Federal Circuit—finding that the imposition of additional costs on the government's prior fixed-price

contractors was protected by the "sovereign acts" doctrine—reversed.

A. Background

1. Beginning in the late 1950s, the government sold uranium enrichment services to utility companies that operated nuclear power plants.[1] The government operated its uranium enrichment enterprise as a commercial business and provided enrichment to its customers pursuant to contracts. *See* 42 U.S.C. § 2201(t) (authorizing such contracts).

Between 1959 and 1985, Yankee purchased uranium enrichment from the government under a series of fixed-price contracts. Both parties agree that Yankee paid the specified prices for all units of enrichment it purchased, and that the contracts precluded the government from increasing the per-unit enrichment prices. *See* App. 2a.

Yankee permanently shut down its only nuclear plant in 1992. It therefore no longer purchases enrichment services from any source.

2. By the 1980s, Congress recognized that the government's uranium enrichment business faced "rising competition from other countries" and a "declining global market share." H.R. Rep. No. 102-474(I), at 142 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1965. Congress addressed this problem by comprehensively restructuring, and planning to privatize, the government's enrichment business. *See* H.R. Rep. No. 102-474(II), at 75 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2064, 2082.

One of the issues Congress faced in restructuring the government's uranium enrichment business was how to address the costs of decontaminating and decommission-

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[1] Those services were provided by a succession of federal entities, including the Atomic Energy Commission and the Department of Energy ("DOE").

ing ("D&D") the government's uranium enrichment plants. Congress concluded that a restructured uranium enrichment business could not operate profitably or maximize its long-term value if it remained responsible for the outstanding D&D costs. *See* H.R. Rep. No. 102-474(I), at 142-145, *reprinted in* 1992 U.S.C.C.A.N. at 1965-1968. Ultimately, Congress (1) created the United States Enrichment Corporation ("USEC") to take over and eventually privatize the government's uranium enrichment business, *see* 42 U.S.C. §§ 2297a, App. 48a, 2297d; and (2) established a separate Uranium Enrichment Decontamination and Decommissioning Fund ("D&D Fund") to pay the D&D costs. 42 U.S.C. § 2297g(a), App. 46a. To finance the D&D Fund, Congress provided for annual deposits of $480 million (adjusted for inflation). *Id.* § 2297g-1(a), App. 46a.

Up to $150 million annually is to be collected from "domestic utilities" over a fifteen-year period, for a total of approximately $2.25 billion. *Id.* § 2297g-1(c), (e), App. 47a-48a.[2] To obtain the $150 million per year, Congress imposed a "special assessment" based on "the total amount of separative work units ["SWUs"][3] [ea]ch utility has *purchased* from the [government] . . . before October 24, 1992." *Id.* § 2297g-1(c), App. 47a (emphasis added). However, in apparent recognition of the small "secondary market" in which purchasing utilities occasionally had sold government-produced SWUs to others, Congress eventually added a definition of the statutory term "purchase," which provides that (1) a utility is considered to have

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[2] Congress authorized appropriations for the remainder. *See* 42 U.S.C. § 2297g-1(d), App. 47a. Between 1993 and 1995, Congress actually appropriated only $331 million to the D&D Fund, $692 million less than authorized by the EPACT. Office of Envtl. Mgmt., U.S. Dep't of Energy, Uranium Enrichment Decontamination & Decommissioning Fund Triennial Report 14 (May 3, 1996).

[3] The "separative work unit," or "SWU," is "the common measure by which uranium enrichment services are sold." 10 C.F.R. § 766.3.

purchased a separative work unit if it was produced by the government but purchased by the utility from another entity, and (2) a utility is not considered to have purchased a government-produced separative work unit if it was initially purchased by that utility but subsequently resold. *Id.* § 2297g-1(c)(1) & (2), App. 47a.

All secondary market SWUs subject to the EPACT assessment originally were purchased under a contract with the government. The government concedes that at most only 15% of the special assessment amounts relate to secondary market SWUs. *See* App. 28a. Therefore, at least 85% of the special assessment falls on enrichment units purchased directly under government contracts.[4]

3. From 1959 to 1985 Yankee purchased a total of 881,860.96 units of uranium enrichment under its contracts with the government and paid prices ranging from $26.00 to $153.00 per SWU. *See* J.A. 555.[5] As a result of the special assessment, Yankee now must pay the government approximately $1 million more each year for fifteen years. Over the fifteen-year period, Yankee will pay approximately $17.00 more for each SWU that it purchased and paid for long ago.[6]

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[4] Yankee believes that all secondary market purchasers subject to the EPACT assessment are utility companies that also had *direct* purchase contracts with the government. The EPACT assessment thus falls solely on this discrete group of contracting utilities.

[5] "J.A." refers to the joint record appendix from the United States Court of Appeals for the Federal Circuit.

[6] Other domestic utilities that purchased enrichment services from the government also have been assessed substantial additional sums. Approximately 30 related cases, each involving claims similar to Yankee's, are currently stayed in the United States Court of Federal Claims pending the outcome in this case.

B. Proceedings Below

4. In 1994 Yankee filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1). Yankee asserted that the special assessment is a retroactive price increase that violates Yankee's fixed-price contract rights. The trial court agreed and granted summary judgment to Yankee. App. 33a. It held that by imposing the per-unit special assessment, "the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power." *Id.* at 41a.

5. A split panel of the Federal Circuit reversed. *Id.* at 1a. The panel majority held that, under the "sovereign acts" doctrine, the EPACT special assessment "constitutes a general exercise of Congress's taxing power . . . rather than an act that retroactively increases the price charged to contracting parties." *Id.* at 14a. It based this conclusion largely on the fact that, in view of the secondary market purchases, "the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services." *Id.* at 10a.[7] Following the same logic with respect to the "unmistakability doctrine," the panel majority found that the fixed-price contract terms "[a]t most" gave Yankee "a vested right to be immune from later attempts to retroactively increase the prices charged." It concluded that "[t]his right has not been taken because . . . the

[7] The Court found that, because the EPACT assessment did not fall *exclusively* on the government's contract partners, (1) Congress' "main purpose" was to "spread the costs" of decontaminating and decommissioning the government's enrichment plants among "the ultimate beneficiar[ies] of the DOE's services," and (2) Congress was not "acting for the purpose of retroactively increasing the price of its earlier contracts." *Id.* at 9a, 10a.

assessment is a general, sovereign act rather than a retroactive price increase." *Id.* at 21a n.8.

In dissent, Judge Mayer found that "the government retroactively abrogated the essence of the contracts at issue." *Id.* at 27a. Given the government's acknowledgment that at least 85% of the special assessment falls on SWUs purchased directly under government contracts, the dissent concluded that the "sovereign acts" doctrine did "not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors." *Id.* at 29a.[8] Therefore, "Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the government's power to retroactively impose additional costs on its contracting partners. A divided panel of the Federal Circuit upheld the retroactive cost-shifting effected by the EPACT assessment, finding it persuasive that "the special assessment does not reach *only* those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had no contracts with the Government." App. 12a (emphasis added and omitted). Thus, despite the fact that the assessment falls *predominantly* on the government's contracting partners, the majority below concluded that it was a "general tax."

This striking holding merits review for several reasons. First, by allowing the government to single out its contracting partners for particular added burdens, the court

[8] *See also id.* at App. 29a (dissent) ("That a small fraction of others who indirectly purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.").

of appeals has seriously altered the proper balance between the obligation of the federal government to respect the terms of its own contracts and the power of the federal government as sovereign to legislate for the public good. *See United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996). Although the fixed-price terms of a contract to purchase goods or services from the government would not typically shield purchasers from exactions imposed by general laws, such contract terms should provide a barrier to *targeted* legislation, like that involved here, which has the substantial effect of shifting the government's performance costs as seller onto the purchaser. That principle not only sets reasonable boundaries for the "sovereign acts" defense, it also accords most naturally with the common-sense expectations of those contracting with the government: namely, that the government, although not contracting away its sovereign powers, is nevertheless bound not to legislate to shift the very risks it assumed in the contract back onto the other party. By treating the legislation here as a "general tax"—on the ground that its impact was not *exclusively* on the government's contracting partners—the Federal Circuit has given far too much leeway to the government to evade its own contractual responsibilities. *See* pp. 9-16, *infra*.

The decision below suffers from a second flaw as well: it forces petitioner (and other utility companies) to retroactively shoulder costs of resolving a problem for which they bear no responsibility. Although this Court has upheld a number of retroactive laws against challenges under the Due Process and Taking Clauses, *see e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), it never has allowed retroactive assessment of costs "that [are] due to causes other than the . . . conduct" of those being assessed. *Turner Elkhorn*, 428 U.S. at 25.[9]

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[9] *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66

Here, the government is seeking to require retroactive payment for the cleanup of its enrichment plants based solely on the utilities' purchase of uranium enrichment services performed at those plants. If that conduct is deemed sufficient to support the imposition of retroactive liability, then the power of the government to reorder past events would be virtually limitless. Moreover, the thirty-year retroactive application of the EPACT assessment is particularly egregious and well beyond periods involved in this Court's previous cases. *See* pp. 16-19, *infra*.

These issues are of both particular and general importance. Most directly, the law at issue here requires petitioner and other utilities to pay up to $150 million annually for a fifteen-year period, a total in excess of $2 billion. More generally, the decision below has a potential effect on any government contractor where the government subsequently decides that it has paid too much or charged too little. According to the court of appeals, the government is then free to increase the obligations of its contracting partners, or presumably to reduce its own obligations, as long as it structures its later actions so that they do not fall *exclusively* on those contracting partners. That holding marks a significant step backward from principles recently reaffirmed by the Court in *Winstar*. Further review therefore is warranted.

I. THE FEDERAL CIRCUIT IMPROPERLY DETERMINED THAT A FEDERAL STATUTORY PROVISION THAT PREDOMINANTLY IMPACTS THE GOVERNMENT'S CONTRACTING PARTNERS IS A "PUBLIC AND GENERAL" SOVEREIGN ACT FOR WHICH THE GOVERNMENT IS IMMUNE FROM CONTRACTUAL LIABILITY.

In upholding the EPACT assessment, the Federal Circuit did not dispute that purchasers like Yankee had paid the full contract prices for the enrichment services. App.

U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42) (challenging basis for imposing retroactive assessments); *see also* pp. 17-18, *infra* (discussing *Eastern Enterprises*).

2a. Nor did the court question that the government would be barred by traditional principles of contract law from simply demanding that its contracting partners pay more for the previously-sold services. *Id.* at 18a. Rather, the court below held that the government was entitled to compel additional payments from its contracting partners to clean up its own enrichment plants because its action was protected by the "sovereign acts" doctrine.

Applying a "purpose"-based test—to "determine whether the Act is designed for the purpose of affecting or altering the Government's prior contracts"—the court found it "[i]mportant[]" that the EPACT assessment, while falling *predominantly* on the government's contracting partners, did not fall *exclusively* on them. *Id.* at 9a-10a. The court thus concluded that the law was not a violation of any contract rights, but merely a "general tax." *Id.* at 12a.

1. The Federal Circuit's analysis has several serious flaws. Initially, it wrongly transforms the sovereign acts defense into a purpose-based inquiry. Nothing in this Court's prior cases declares that inquiry into legislative *purpose* is determinative of whether the government has breached its prior contracts. Rather, the decisions look to the *effects* on the government's contract obligations of its later actions.[10] *See* pp. 11-14, *infra.* Moreover, as the Court has frequently recognized, inquiry into legislative purpose often is unreliable. Indeed, in this very case the Federal Circuit's focus on legislative "purpose" led it to attribute dispositive importance to a provision added simply to accommodate the small secondary market for SWUs "purchased from" the government under contracts.

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[10] *See Winstar*, 116 S.Ct. at 2468 (plurality opinion) ("Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners.").

2. The court of appeals then compounded its error by wholly distorting the standards for determining whether later government actions are "public and general" with only an "incidental" effect on persons contracting with the government. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). In finding that the special assessment was a "general tax," because it purportedly did not apply *only* to the government's contracting partners, the court below essentially ignored the standards set forth in *Winstar*.

In the principal opinion in *Winstar*, Justice Souter explained that the key factor in determining whether a governmental act is "public and general" for purposes of the "sovereign acts" defense is whether "a substantial part of the impact of the Government's action . . . falls on its own contractual obligations." *Winstar*, 116 S.Ct. at 2466 (plurality opinion); *see also id.* at 2467 ("the Government's capacities must be treated as fused when the Government acts in a non-general way"); *id.* at 2467 ("a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations").

When a statute, like the EPACT provision involved here, falls predominantly (at least 85%) on the government's contracting partners, a "substantial part of [its] impact" is plainly upon the government's contractual obligations. Justice Souter also explained that in evaluating impact, "[t]he greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence." *Id.* at 2466. Here the EPACT assessment, by enabling the government to divert its old D&D liabilities away from its new corporation (USEC), reflects precisely the kind of "governmental object of self-relief" that Justice Souter described.

The decision below is also at odds with Justice Scalia's analysis in *Winstar*.[11] Justice Scalia found that although generally "contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions," *id.* at 2477 (Scalia, J., concurring in the judgment), when the government is a contracting party, a reverse presumption is more appropriate:

> [I]t is reasonable to presume (*unless the opposite clearly appears*) that the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will *incidentally* disable it or the other party from performing.

Id. (third emphasis added).

A statute like EPACT that is so substantially directed at the government's own contracts easily overcomes this "reverse presumption." As Justice Scalia explained, government contractors must necessarily accept that the government's "multifarious sovereign acts, needful for the public good," may "incidentally disable" performance. *Id.* It is completely untenable to suppose, however, that the government's contracting partners understand and accept that the government can *release* itself from contractual liability simply by enacting legislation that is principally *directed* at its own contracts. Yet that is precisely the understanding that the Federal Circuit decision attributes to Yankee (and the other contracting utilities).[12]

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[11] Justice Scalia discussed the government's sovereignty-based defenses primarily in terms of the "unmistakability" doctrine, noting that the "sovereign acts" doctrine is essentially the same and "is avoided whenever [the unmistakability doctrine] would be." 116 S.Ct. at 2478 (Scalia, J., concurring in the judgment).

[12] Justice Breyer, who joined Justice Souter's opinion for the plurality in *Winstar*, also separately advocated an approach to unmistakability similar to that of Justice Scalia. 116 S.Ct. at 2472 (Breyer, J., concurring).

3. The Court's prior cases also make clear that a law is not "public and general" for purposes of the sovereign acts defense merely because it affects some persons other than the government's contracting partners. In *Perry v. United States*, 294 U.S. 330 (1935), the statute voided gold payment clauses in "every obligation," public and private, *id.* at 349, and in *Lynch v. United States*, 292 U.S. 571 (1934), the statute was a sweeping repeal of "all laws granting or pertaining to" renewable term insurance. *Id.* at 575.[13] In both cases, however, the Court held that those broad-reaching statutes improperly abrogated federal contracts—in *Perry* a government bond and in *Lynch* a veteran's insurance policy. Indeed, in *Winstar* also, the statute required deduction of "goodwill" from the regulatory capital of *all* thrifts, whether or not they had a contract with the government. 116 S.Ct. at 2446; *see* 12 U.S.C. § 1464(t)(1)(A), (9)(A) & (C); *see also* App. 28a.

The Court's Contract Clause cases also emphasize that the proper inquiry is the impact of legislation on government contract rights. In *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 619 (1942), for example, the Court held that a statutory assessment imposed on the Commonwealth's prior contractors "was not a general tax" but "a clear violation of the obligation of the contracts." In *Murray v. Charleston*, 96 U.S. 432 (1878), the Court struck down a municipal statute taxing interest paid on the city's own debt, noting that "the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors." *Id.* at 446.

4. The panel majority's determination that "the fixed-price terms of the contract[s here] do not constitute an

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[13] *Perry* and *Lynch* were, prior to *Winstar*, the "two principal cases of this century holding that the Government may not simply repudiate its contractual obligations." 116 S.Ct. at 2478 (Scalia, J., concurring in the judgment).

unmistakable promise on behalf of the Government that it will not impose a *general* assessment," App. 20a (emphasis added), is entirely beside the point. For reasons explained above, the EPACT special assessment is *not* a "public and general" sovereign act. It follows that the fixed-price terms of Yankee's contracts *do* protect it from the assessment, without need for any special, more "unmistakable," language. The Federal Circuit panel majority acknowledged as much in a footnote. *See* App. 21a n.8.

To require special language in government contracts protecting against governmental acts that are not "public and general" would contravene the bedrock principle of contract law that the intent of the parties to a contract controls its interpretation. As discussed above, *see* p. 12, *supra, neither* party to a government contract understands that the government may later avoid its contract obligations through legislation that is squarely *directed* at the government's contracting partners and that falls predominantly (at least 85%) on them. To imply such an understanding, as the Federal Circuit in effect did here, makes the sovereign acts doctrine superfluous and makes most government contracts illusory.[14]

5. That the EPACT special assessment violates Yankee's fixed-price contract rights does not mean that

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[14] *Lynch* and *Perry* both involved legislation that had a substantial impact on federal contract rights, and in neither case did the contracts contain—or did the Court even look for or mention—any special "unmistakable" protective contract language. No such language is necessary, as Justices Souter and Scalia also recognized in *Winstar*, where, as in this case too, the government contravenes its own contractual obligations through legislation that is *not* "public and general." Conversely, to protect against a legitimately "public and general" sovereign act, a government contract *would* have to contain special "unmistakable" language because the parties would not ordinarily understand the basic promissory language to provide such protection.

the government is powerless to raise funds necessary to decontaminate and decommission its uranium enrichment plants. To the contrary, as both the trial court and the Federal Circuit dissent recognized, the government remains free to finance its D&D effort through broader, more general taxes. App. 31a, 40a. How broad those taxes must be is not the issue here. Because the impact of this particular "tax" falls so substantially and directly on Yankee and the other utilities that were the government's contracting partners, and because that impact is so clearly contrary to the reasonable expectations of the contracting parties, the EPACT special assessment cannot possibly be considered a "public and general" act for purposes of the sovereign acts defense.

* * * *

The standard the Federal Circuit has adopted for determining when legislation is "public and general" turns the sovereign acts defense on its head. As interpreted by the court below, the sovereign acts doctrine is no longer a limited exception to the general principle that federal contracts are governed by ordinary contract law principles. Rather, by making application of the doctrine turn on whether the later law is coincident with the scope of the government's prior obligations, the decision below *invites* Congress to enact legislation that directly and deliberately impairs the rights of a majority of the government's contracting partners. The government, in that event, still can claim the defense of sovereign acts based on such a supposedly "public and general" law.

Drawing the proper line between the government's sovereign authority and its contractual obligations is often complex and difficult. In this case the task is straightforward, and the Federal Circuit has patently drawn the wrong line. A statute that targets and hits the overwhelming majority of the government's contracting partners is

not a "public and general" act. The Federal Circuit's contrary holding represents a dramatic expansion of the sovereign acts defense and conflicts with precedent of this Court.

II. THE FEDERAL CIRCUIT MISTAKENLY HELD THAT A THIRTY-YEAR RETROACTIVE MONETARY ASSESSMENT IS JUSTIFIED BY NOTHING MORE THAN THE PAST PURCHASE OF GOVERNMENT-PRODUCED SERVICES.

In 1992, Congress specifically imposed the EPACT special assessment based on the number of government-produced uranium enrichment units that utilities previously had purchased. 42 U.S.C. § 2297g-1(c), App. 47a. Under the Federal Circuit's analysis, the *sole* justification for the statute's retroactive application is that Yankee and other nuclear utility companies purchased, and therefore were the "ultimate beneficiar[ies]" of, government-produced enrichment services. App. 10a.[15] Even putting aside the fact that the utilities already had paid the agreed prices for any "benefit" they obtained from the enrichment services, the mere purchase of a government-produced product or service is not enough to justify a new monetary assessment that reopens otherwise long-settled transactions.

In prior due process decisions regarding the constitutionality of retroactive legislation, the Court has emphasized the importance of a nexus between the liability imposed by the statute and the conduct the statute targets—such as an employment relationship, which justified imposing on mine operators the retroactive requirement to pay benefits to disabled miners, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976); or participation in a multi-employer pension plan, which increased the pension

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[15] EPACT's effect is clearly retroactive because it imposes a new liability in respect of past events. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

plan's liability and justified imposition of retroactive withdrawal liability, *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637-38 (1993). The Court thus has allowed retroactive cost spreading only to parties whose conduct makes them "responsible" for the conditions that prompted enactment of the remedial legislation. Indeed, in *Turner Elkhorn*, the Court pointed out that any legislative attempt to award retroactive compensation to workers for harm "unrelated to [a coal] operator's conduct" would present a different magnitude of constitutional "difficulties." 428 U.S. at 24.

The purchase of government-produced uranium enrichment services obviously has *some* "connection" to the D&D costs arising from the government's contamination of its enrichment plants. But it would be a considerable step to say that the purchasers can be held legally responsible for the D&D costs. Those costs, like the underlying conduct leading to contamination of the plants, were at all times within the control of the government. The government, as producer of the uranium enrichment services—not the utilities as purchasers of those services—was responsible *both* for the plant conditions *and* for assuring that the prices it charged were adequate and available to cover the costs of production.

Whether Yankee's purchase of government-produced enrichment services in these circumstances *alone* is sufficient conduct to support the retroactive EPACT assessment, even under the deferential standards recognized by the Court, is a question warranting further review. Indeed, the Court recently granted review in a case that directly raises the issue of what constitutes a sufficient nexus to justify legislative imposition of retroactive liability. *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42). The Court thus has squarely before it the important

question "whether retroactive cost-spreading legislation violates the Due Process Clause of the Fifth Amendment as applied to a party whose conduct did not cause the economic burden the statute was designed to address." Reply Brief in *Eastern Enterprises,* No. 97-42 at 1-2.

This case is even starker, given the implications for those who do business with the government. First, unlike *Eastern Enterprises,* this case involves the government's retroactive rearrangement of its *own* financial liabilities rather than private liabilities. Under the decision below, the government can impose a retroactive monetary assessment (or other retroactive legislation) upon any person simply because he or she previously has *purchased* a government-produced product or service. If that conduct is sufficient to permit the imposition of retroactive liability for costs generated by the government in providing the purchased products or services, as the court below held, there would seem to be no limit on the government's power to reorder responsibility for its own past conduct.

Second, the extraordinary period of retroactivity in the Energy Policy Act goes far beyond what the Court has allowed. Indeed, the thirty-year reach-back of this statute works a particular hardship on petitioner, given that Yankee ceased operation of its only electricity-generating facility before EPACT was enacted. *See* App. 4a. The Act thus assesses liability for engaging in a business that petitioner does not even conduct anymore—the kind of mismatch between past and present activities that is likely to become more pronounced as the period of retroactivity lengthens.

Even in upholding retroactive legislation, the Court has specifically noted that the relevant periods of retroactivity were quite limited. *See, e.g., United States v. Carlton,* 512 U.S. 26, 32 (1994) ("Congress acted promptly and established only a modest period of retroactivity [slightly greater than one year]"); *Pension Benefit Guaranty Corp.*

v. R.A. Gray & Co., 467 U.S. 717, 731 (1984) ("Congress advanced the effective date chosen so that it would encompass only that retroactive time period [five months] that Congress believed would be necessary to accomplish its purposes").[16] Where, as here, the statute reaches back far beyond a "modest period of retroactivity," the power of Congress to reorder responsibility for completed transactions or events should be viewed with skepticism. *See United States v. Carlton*, 512 U.S. at 38 (O'Connor, J., concurring in the judgment) (period of retroactivity longer than a year "would raise . . . serious constitutional questions").

III. THE FEDERAL CIRCUIT DECISION FUNDAMENTALLY ALTERS THE PROPER BALANCE BETWEEN THE GOVERNMENT'S SOVEREIGN AUTHORITY AND THE CONTRACTUAL AND FIFTH AMENDMENT RIGHTS OF THOSE WITH WHOM IT DOES BUSINESS.

Further consideration of the significant issues presented in this case is of special importance for several additional reasons. First, the Federal Circuit's decision directly affects approximately thirty similar cases currently stayed in the Court of Federal Claims and awaiting the outcome of this case. The pending cases collectively involve more than $2 billion in special assessment amounts to be paid until the year 2007.

Second, the decision below also will have a more general impact because it is the first interpretation of *Winstar* by the only court of appeals with special jurisdiction over Tucker Act claims. The extreme views of the Fed-

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[16] *See also United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam) (the passage of retroactive legislation "confined to short and limited periods required by the practicalities of producing national legislation" is a "customary congressional practice"); *cf. Nichols v. Coolidge*, 274 U.S. 531 (1927) (invalidating tax legislation reaching back twelve years).

eral Circuit panel majority—regarding both the sovereign acts defense and Congress' retroactive powers—should at least be reviewed before they are applied more generally by the Federal Circuit and the Court of Federal Claims, the courts charged with responsibility over Tucker Act cases, and by other lower courts that may also be seeking authoritative guidance on the meaning of *Winstar*.

Finally, this case presents contract and constitutional issues significantly affecting all who do business with the federal government (and, by extension, with state and local governments as well). To the extent the decision below invites the government to retroactively rewrite the financial or other terms of its own contracts, the decision impairs the government's reliability as a contracting partner. Contractors will be deterred from dealing with the government under such circumstances. At a minimum, the decision below will "undermin[e] the Government's credibility at the bargaining table and increas[e] the cost of its engagements," results that are contrary to "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *Winstar*, 116 S.Ct. at 2459 (plurality opinion). The court of appeals' approval of the thirty-year retroactivity of the EPACT assessment also has far-reaching implications, making it difficult to discern *any* limit on the power of the government to attach new legal consequences to remote historic events.

The consequences of the Federal Circuit's decision are clear and alarming. Further review is therefore warranted.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.[17]

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[17] Alternatively, if the Court elects not to grant plenary review in this case, Yankee requests that the Court defer ruling on its petition pending disposition of *Eastern Enterprises*, and then remand this case to the Federal Circuit for consideration in light of that decision. *See Lawrence v. Chater*, 516 U.S. 193 (1996).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 96-5021, 96-5025

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

May 6, 1997

Before MAYER, LOURIE, and CLEVENGER, Circuit Judges.

Opinion of the court filed by Circuit Judge CLEVENGER. Dissenting opinion filed by Circuit Judge MAYER.

CLEVENGER, Circuit Judge.

This case requires us to decide whether, in light of prior contracts specifying the price to be paid for uranium enrichment services, the Government may impose upon domestic utilities a special assessment to aid in funding the clean-up costs associated with the facilities that provided those enrichment services.

The United States appeals the decision of the United States Court of Federal Claims, *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), granting summary judgment to Yankee Atomic Electric Company (Yankee Atomic). In that decision, the court deter-

mined that the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices. We conclude that the assessment was lawful and therefore reverse.

I

As both parties acknowledge, the salient facts are not in dispute. Yankee Atomic was organized in 1954 by a number of existing utility companies in an effort to participate in the use of atomic energy as an alternative-source fuel for generating electricity. Yankee Atomic produced electricity using nuclear fuels and sold the resulting electricity to the organizing utilities, which, in turn, sold it to retail customers.

Yankee Atomic's operations required an enriched form of uranium, which was produced by separating useful isotopes of uranium from other isotopes. Beginning in 1963, Yankee Atomic purchased the uranium enrichment (or separation) services from the Government through a series of contracts. Those services were provided at enrichment plants operated first by the Atomic Energy Commission (AEC or Commission) and later by the Energy Research and Development Administration and the Department of Energy (all collectively DOE). Although these contracts varied somewhat from one to another, they each stated that the price paid by Yankee Atomic for the enrichment services would be based on "established Commission pricing policy," which was defined as the price in effect at the time the service was provided. There is no dispute that the Government fulfilled its contractual obligation to provide the enrichment services, and that Yankee Atomic fulfilled its obligation to pay the price in effect at that time.

In the late 1980s, Congress determined that it had to restructure the Government's uranium enrichment services in order to remain competitive with enrichment services

provided by other parties. It did so by creating a new, for-profit, governmental corporation called the United States Enrichment Corporation. At the same time, Congress realized that there would be large costs associated with decontaminating and decommissioning the facilities that had previously been used to provide enrichment services. The Department of Energy estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation. H.R.Rep. No. 474, pt. VIII, at 77 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2295. Because this decontamination and decommissioning fiscal problem was not recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem.

This clean-up problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992 (Energy Policy Act or Act). The Act establishes an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (Fund), which, over a 15-year period, would accumulate the monies required to clean up the old uranium enrichment plants. The Act provides that the annual deposits of $480 million (adjusted for inflation), will come from two sources: (i) up to $150 million is to be collected as a special assessment from domestic utility companies; and (ii) the balance, at least $330 million, is to come from public funds appropriated by Congress.

The Act further provides that each utility is responsible for a pro-rata share of the total annual assessment based on the percentage of uranium enrichment work units it previously purchased from the DOE relative to the total number of work units previously produced by the DOE. The Act states that a utility is considered to have purchased a work unit from the DOE if the work unit was originally produced by DOE, even if the utility actually purchased it from another source. Similarly, a utility is

not considered to have purchased a work unit from the DOE if it resold that work unit to another utility.[1] In sum, the Act imposes the assessment upon whichever utility company eventually uses the enrichment services.

Following the passage of the Act in October 1992, the DOE sought to assess Yankee Atomic's share of the annual special assessment. Yankee Atomic responded by arguing to the DOE that it should be exempted from the assessment because its facilities had shut down before passage of the Act. When the DOE rejected this argument, Yankee Atomic paid approximately $3 million pursuant to three annual assessments, and filed a lawsuit in the Court of Federal Claims seeking recovery of those payments.

II

Upon cross-motions for summary judgment, the Court of Federal Claims ruled in favor of Yankee Atomic. The court rejected the Government's contention that the special assessment was a lawful exercise of Congress's taxing power under the sovereign acts doctrine. The court explained that although the sovereign acts doctrine would have some force if the case involved a general tax that fell on all utilities alike, it had no impact in the present case which involves an assessment that "reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services." Accordingly, the court viewed the special assessment as a unilateral retroactive increase in the price previously charged by the Government for its uranium enrichment services.

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[1] These provisions were designed to take into account the secondary market that existed for uranium enrichment services, wherein some utilities purchased uranium enrichment work units from the Government and resold them to other utilities. Yankee Atomic purchased a portion of its uranium enrichment services through this secondary market, but does not assert any breach of contract, taking, or unlawful exaction claim concerning its monetary liability under the Act for those purchases.

The court explained that such a retroactive price increase would constitute an unlawful exaction in view of the prior contracts between the Government and Yankee Atomic. Because those prior contracts specified a fixed price for the uranium enrichment services, the "economic benefit which [Yankee Atomic] gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away." 33 Fed. Cl. at 585.

Based on this conclusion, the court granted Yankee Atomic's motion for summary judgment without addressing Yankee Atomic's argument that it was exempt from the assessment because its facilities had closed before passage of the Act. We review the Government's appeal, and Yankee Atomic's cross-appeal, from the judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (1994).

III

The decision of the Court of Federal Claims is driven by its characterization of the special assessment as a retroactive price increase rather than an exercise of the sovereign's taxing power, and the parties' dispute over this characterization frames the dispositive issue of this appeal.

The Government's principal argument is that the special assessment is entirely distinct from the prior contracts between the DOE and utility companies such as Yankee Atomic. The Government notes that those earlier contracts concerned uranium enrichment, whereas this assessment concerns decontamination and decommissioning. As a result, the Government asserts that the assessment cannot constitute a breach of those earlier contracts unless those contracts contained an express provision that precluded the Government from imposing an assessment to fund decontamination and decommissioning costs.

Yankee Atomic disagrees with the Government's characterization of the assessment and contends that it is di-

rectly related to the earlier contracts. Yankee Atomic contends that the fixed-price nature of those contracts expressly limited its obligation to the price already paid, and shifted the risk of any additional costs (including decontamination and decommissioning costs) onto the Government. Yankee Atomic argues that the assessment breaches those contracts by, in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services.[2]

Resolution of this disputed characterization requires us to consider and apply two related bodies of law: the sovereign acts doctrine and the unmistakability doctrine. We consider each in turn.

IV

The sovereign acts doctrine stems from a series of decisions by the Court of Claims, and was first recognized by the United States Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In that case, Horowitz submitted a bid to buy certain Habutai silk offered for sale by the Government. The Government agreed that Horowitz would be given the opportunity to re-sell the silk before paying the purchase price, and agreed to ship the silk within a day or two after shipping instructions were given. *Id.* at 459, 45 S.Ct. at 344. Horowitz sold the silk to a silk company, paid the balance of the purchase price, and requested that the silk

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[2] Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government.

be shipped to the silk company at once. Because of a governmental embargo placed on the shipment of silk by freight, however, the silk was not shipped for several weeks. By the time it arrived, the price of silk had dropped significantly, and the consignee refused to accept delivery. As a result, Horowitz was forced to sell the silk at a loss. *Id.* at 460, 45 S.Ct. at 344.

Horowitz sued the United States, contending that the embargo breached the valid contract he had for sale and shipment of the silk. The United States Supreme Court rejected this argument because "[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Id.* at 461, 45 S.Ct. at 344. The Court adopted the reasoning of the Court of Claims:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. *Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.* . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Id. (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)) (emphasis added).[3]

[3] The Court of Claims expressed this same philosophy in *O'Neill v. United States*, 231 Ct.Cl. 823, 826 (1982), as follows:

The Supreme Court recently discussed *Horowitz*, and the sovereign acts doctrine in general, in *United States v. Winstar Corp.*, —— U.S. ——, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).[4] In *Winstar*, the plurality explained that the doctrine is designed to distinguish between the Government's twin roles as contractor and sovereign. *Id.* at ——, 116 S.Ct. at 2463. When the Government enters into a contract, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at ——-——, 116 S.Ct. at 2464-65. The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.

> From its earliest days . . . application of the sovereign act[s] doctrine has proceeded from the recognition that in governing the country, the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts. Were those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party *for the governing action.* Given the large number of contracts the Government enters, *its* contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act[s] doctrine is that in those circumstances, *the Government in its contracting role, like its private counterpart, should not incur liability for its act done in the governing role.*

[4] The sovereign acts doctrine has also been cited in several other cases since *Horowitz*. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46, 102 S.Ct. 894, 905-06, 71 L.Ed.2d 21 (1982) (discussing that the petitioners confuse the Tribe's role as commercial partner with its role as sovereign); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed.Cir.1990) (explaining that the Uranium Mill Tailings Radiation Control Act was a sovereign act undertaken for the public good and, therefore, could not form the basis for a party's breach of contract claim).

On the other hand, the plurality explained, the Government-as-sovereign must remain free to exercise its powers. For this reason, the early Court of Claims cases "thought it 'grave error' to suppose that 'general enactments of Congress are to be construed as evasions of [the plaintiff's] particular contract.'" *Id.* at ——, 116 S.Ct. at 2464 (quoting *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865)). The sovereign acts doctrine attempts to "balance[] the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." [5] *Id.* at ——, 116 S.Ct. at 2465. Thus, it is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.

Under the sovereign acts doctrine, therefore, we must decide whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public). We conclude it was the latter.

As explained above, we must begin by examining the scope of the Energy Policy Act; only then can we determine whether the Act is designed with the purpose of

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[5] The concurring and dissenting justices agreed with this general statement of the doctrine. Under the facts of *Winstar*, *see infra* section IV.A, only three justices concluded that the congressional act was not a sovereign one (*i.e.*, the act was attributable to the Government-as-contractor). The remaining justices either viewed the act as a sovereign one or decided the case on another basis.

affecting or altering the Government's prior contracts. The Energy Policy Act requires contribution to the Fund from any domestic utility that purchased separative work units from the DOE before the Act's passage. 42 U.S.C. § 2297g-1(c) (1994). Importantly, however, the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services, because the Act *does not* require contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility. *See* 42 U.S.C. § 2297g-1(c)(2). In contrast, the Act *does* require contribution from any utility that did not have a contract with the DOE but nonetheless benefited from the DOE's services by purchasing through the secondary market. *See* 42 U.S.C. § 2297g-1(c)(1). Thus, some utility/Government contracts are not embraced by the Act, while some purchases from private entities are covered. The key is whether the purchaser was the ultimate beneficiary of the DOE's services.

The reach of the Act, therefore, makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements. Rather than targeting those utility companies that had prior contracts with the Government, the Act targets whichever utility eventually used and benefited from the DOE's enrichment services. Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed. *Cf. Atlas Corp.*, 895 F.2d at 748 (noting that the dangers and clean-up costs associated with uranium milling operations were not fully recognized until the late 1970s). It did so by dividing the costs between: (i) the Government, which was responsible for at least $330 million per year to be raised through general appropriations, and (ii) those domestic utilities that benefited from the DOE's uranium enrichment services. Any impact that this approach may have on those utilities with which the Government had prior contracts is "merely in-

cidental to the accomplishment of a broader governmental objective." *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2466.

In characterizing the essence of the Act, Yankee Atomic focuses only on the provisions that impact those utilities that contracted with the Government and that themselves used the enrichment services. While it is true that Yankee Atomic has no quarrel with the Government over its liability on consumption of enrichment services supplied by non-governmental entities through the secondary market, that fact cannot render irrelevant the Act's provisions that reach even those utilities that did not contract with the Government. When construing an act of Congress, and especially when determining the essential characteristic of a particular statute, we must observe and understand the statute as a whole. *See Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act."); *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A.1982) ("Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole, and it is not proper to confine interpretation to the one section to be construed." (citation omitted)). Statutory provisions that are relevant, or as here, controlling, to our interpretation cannot be ignored simply because they are not dispositive to the facts before us.

Similarly, the opinion of the Court of Federal Claims seems to have been mistaken in reasoning: "The [sovereign acts doctrine] argument would have some force if we were dealing with a general tax that fell on all utilities

alike. That, however, is not our case. Rather, *this special assessment reaches only those utility companies that previously had contracted with the Government* for the purchase of uranium enrichment services." 33 Fed. Cl. at 585 (emphasis added). As explained above, the special assessment does not reach only those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had *no* contracts with the Government. Ironically, then, the assessment appears to be very similar to what the Court of Federal Claims thought it was not: a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services.[6]

The broad reach of the Energy Policy Act also distinguishes the present case from two cases upon which

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[6] To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs. One such example involves the costs of cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et. seq. (1994). *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.1986). The defendants in those lawsuits have frequently challenged the retroactive application of CERCLA as a violation of their due process rights and as an unconstitutional taking. The courts, however, have rejected those arguments. *See id* at 734 (rejecting due process challenge because "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

Yankee Atomic contends that the CERCLA cases, and others like them, are inapposite because they involve the impact of legislation on private parties and therefore do not implicate the Government's self-interest. *See Perry v. United States*, 294 U.S. 330, 350-51, 55 S.Ct. 432, 434-35, 79 L.Ed. 912 (1935). We cite the CERCLA cases not for their insight as to Congress's motives in enacting the Energy Policy Act, but rather for their general proposition that the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem.

Yankee Atomic and the Court of Federal Claims relied: *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

In *Lynch*, the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the prescribed monthly premiums. 292 U.S. at 576, 54 S.Ct. at 842. Congress subsequently enacted the Economy Act which included a clause stating: "All laws granting or pertaining to yearly renewable term insurance are hereby repealed." *Id.* at 575, 54 S.Ct. at 842. The Supreme Court held the legislation unlawful without discussing the sovereign acts doctrine, which is not surprising given that the clause was clearly directed to abrogating past war risk insurance contracts for reasons of economy. As the Court stated: "No doubt there was in March, 1933, great need of economy. . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580, 54 S.Ct. at 844.

In *Perry*, the plaintiff owned a $10,000 government bond which, when redeemed, required the United States to pay in "gold coin of the present standard of value." 294 U.S. at 346-47, 55 S.Ct. at 433. Congress later passed a joint resolution which stated that payment of obligations in gold was against public policy and, therefore, all obligations shall be discharged by payment in currency that is legal tender. *Id.* at 349, 55 S.Ct. at 434. The enactment specifically stated that "provisions for payment in gold, 'contained in any law authorizing obligations to be issued by or under authority of the United States,' were repealed." *Id.* Based on this clear expression of an intention to abrogate past contracts, the Court again held the act unlawful without discussing the sovereign acts doctrine.

In sum, *Lynch* and *Perry* both involved situations where the congressional act made clear that its purpose was, at

least in part, to abrogate past public contracts. The Energy Policy Act, in contrast, reveals no such purpose of targeting past contracts. Instead, the Act taxes all beneficiaries of the DOE's uranium enrichment services.

Given the focus of the relevant provisions of the Energy Policy Act, we conclude that it constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services. This conclusion does not end our inquiry, however. We must further consider whether the Government, by contract with Yankee Atomic, has surrendered the right to exercise this sovereign power "in terms which admit of no other reasonable interpretation." *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907. This requires us to consider and apply the unmistakability doctrine.

V

As the Supreme Court plurality recently explained in *Winstar*, the modern unmistakability doctrine "marks the point of intersection between two fundamental constitutional concepts." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2453. One concept, which developed in England, is that of parliamentary sovereignty. This concept posits that because the legislature has absolute authority and acknowledges no superior power, it cannot be bound by acts of a prior legislature. *Id.* The other concept, which developed in the United States, is that legislative power may be limited under certain circumstances. Unlike the absolute power enjoyed by the Parliament in England, the legislature in the United States is "subject to the overriding dictates of the Constitution and the obligations that it authorizes." *Id.* at ——-——, 116 S.Ct. at 2453-54. One such limitation is that embodied in the Contracts Clause, which prohibits a state from passing any law that impairs the obligation of contracts. *See* U.S. Const., Art. I, § 10, cl. 1.

Although the Contracts Clause does not apply to acts of the United States, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. . . . The extent of that capacity, to be sure, remains somewhat obscure." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2455 (citations omitted).

The modern unmistakability doctrine is a canon of construction that attempts to balance these two somewhat competing concepts by allowing the Government to make agreements that bind future Congresses, but only if those contracts contain an unmistakable promise. Thus, the plurality in *Winstar* summarized the almost 160-year history of the unmistakability doctrine as follows:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Id. at ——, 116 S.Ct. at 2456.[7]

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[7] The remaining justices in *Winstar* essentially agreed with this formulation of the doctrine, although they disagreed with its application to the facts of that case. The two dissenting justices viewed the doctrine to embody the notion that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *Id.* at ——, 116 S.Ct. at 2480 (Rehnquist, J., dissenting). The three concurring justices stated the doctrine as follows:

> [I]t is reasonable to presume (unless the opposite clearly appears) that the sovereign does not promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts. . . . Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts

In *Winstar*, the justices were divided as to whether or not the unmistakability doctrine was even applicable, given the facts of that case. Therefore, we next address the issue of whether the doctrine is applicable under the facts of the present case.

A

The plurality of justices in *Winstar* decided that the unmistakability doctrine was not applicable. *Winstar* involved the fallout from the crisis involving the savings and loan industry in the late 1970s and early 1980s. The Government induced healthy thrifts to merge with ailing ones by agreeing to provide favorable regulatory treatment, which would allow the healthy thrifts to count towards their capitalization requirements certain "supervisory goodwill" generated by the mergers. *Winstar*, —— U.S. at ——-——, 116 S.Ct. at 2442-43. This scheme, however, was ultimately unsuccessful in resolving the thrift industry crisis. As a result, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which required that all thrift institutions no longer use "supervisory goodwill" to meet their capitalization requirements. This immediately caused several thrifts to fall out of compliance with capitalization requirements, thereby making them subject to seizure by thrift regulators. *Id.* at ——, 116 S.Ct. at 2446. The thrifts filed suit claiming breach of contract.

After reciting the history of the unmistakability doctrine, the *Winstar* plurality stated:

> The cases extending back into the 19th-century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered a sovereign power (e.g., to tax or control

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must be interpreted in a common-sense way against that background understanding.

Id. at ——, 116 S.Ct. at 2477 (Scalia, J., concurring).

> navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power. . . . *The application of the doctrine thus turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government.*

Id. at ——-——, 116 S.Ct. at 2456-57 (footnote omitted; emphasis added). The plurality held that the doctrine was inapplicable because the contracts with the thrifts did not preclude the Government from later exercising its sovereign powers. Instead, the contracts merely shifted the risk of loss onto the Government, thereby requiring it to "indemnify its contracting partners against financial losses arising from regulatory change." *Id.* at ——, 116 S.Ct. at 2461.

Five justices disagreed with the plurality's conclusion that the unmistakability doctrine was not available simply because the contracts were risk-shifting agreements. The three concurring justices pointed out that the plurality's approach was inconsistent with precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at ——, 116 S.Ct. at 2476. Moreover, "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Id.* Despite this difference, these three justices concurred because they believed that the contracts contained unmistakable promises to continue the favorable regulatory treatment. *Id.* at ——-——, 116 S.Ct. at 2477-78. The two dissenting justices concluded that the doctrine applied and that the contracts did not contain an unmistakable promise against future regulatory change.

Based on the reasoning contained in the *Winstar* opinions, we conclude that the unmistakability doctrine applies in the present case. This conclusion respects the views of

the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts. In addition, our conclusion is in harmony with the views of the plurality justices. To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine. As mentioned above, the contracts at issue are fixed-price contracts, and the Supreme Court has held that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918). Similarly, our predecessor court has stated that "the [seller] in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs., Inc. v. United States*, 207 Ct. Cl. 743, 524 F.2d 680, 691 (1975) (citations omitted).

Importantly, however, the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government. *Winstar*, —— U.S. at ——-——, 116 S.Ct. at 2457-58. As explained above, the assessment at issue in the present case is a general, sovereign act. Although Yankee Atomic seeks money damages, its argument would effectively block the exercise of this sovereign power to tax, for if Yankee Atomic were to prevail, the Government would be required to refund the entire amount assessed. This is akin to a tax rebate, which even the plurality seemed to recognize as a block to the exercise of sovereign power. *See id.* at ——, 116 S.Ct. at 2458 ("Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power.").

B

Having decided that the unmistakability doctrine applies, we next address the merits of the arguments on that issue. This requires us to decide whether the contracts between Yankee Atomic and the Government unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax. We conclude that no such promise existed in the contracts.

We begin by noting that none of the contracts expressly states that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole. Yankee Atomic acknowledges the lack of any such express statement, but instead relies on the fixed-price nature of the contract. Yankee Atomic argues that "[t]he fixed-price contract terms are hardly implicit, and they *forbid* a future price increase." Although the contracts include fixed-price terms, we must determine whether those terms unmistakably encompassed future taxes or assessments.

To determine the scope of those fixed price terms, we look to the language of the contracts. Although the language of the several contracts varies somewhat, the contract executed on March 9, 1971, entitled "Agreement For Furnishing Uranium Enrichment Services" is representative. Article III of that agreement provides, in part:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of

> separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

From examining the contracts, we decide that the fixed-price terms of the contract do not constitute an unmistakable promise on behalf of the Government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services. The language of the contract is directed at the prices charged for providing enriched uranium to Yankee Atomic, and not to any decontamination or decommissioning costs which may subsequently arise. Thus, the contract states that "[t]he charges [are] to be paid to the Commission *for enriching services provided*," and sets a ceiling price of $30 per Kg unit "for separation of U-235 from U-238."

The Government complied with this provision by providing the enriched uranium at the agreed-upon price. At that point, the contract was fully performed by both parties. This gave Yankee Atomic a vested contract right which would then bar the Government from deliberately attempting to charge more for performance of those contracts. As explained above in the sovereign acts doctrine discussion, however, the subsequent assessment is not a deliberate retroactive increase in the price of those contracts. Instead, it is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government.

The opinion of the Court of Federal Claims is not clear as to whether or not it discerned an unmistakable promise that barred the subsequent special assessment. On the one hand, after reciting several unmistakability doctrine cases, the court stated: "*But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation*, exercise of the

sovereign power does not proceed unchecked." 33 Fed. Cl. at 584. The underscored portion of this statement indicates that the court viewed the contracts as containing no unmistakable promise that precluded the Government from later imposing an assessment.

On the other hand, the court's opinion can be read to indicate that it found such an unmistakable promise. The court explained that the congressional acts required the AEC to charge prices that assured reasonable compensation to the Government, which was later defined as recovery of the Government's costs over a reasonable period of time. Based on these legislative mandates, the court stated: "[i]n short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services." 33 Fed. Cl. at 584. This indicates that the court implied an unmistakable promise from legislative mandates. To the extent that the Court of Federal Claims implied an unmistakable promise from the legislative acts, we conclude it erred. Put simply, a specific promise implied from general legislative acts is not an unmistakable one.

Therefore, we conclude that the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services.[8]

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[8] Our conclusion on this point also resolves Yankee Atomic's takings argument. Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase. For the same reason, *Lynch* and *Perry* are inapposite. In each of those cases, the

VI

Yankee Atomic also contends that even if we should rule against it on its contractual arguments, it should nonetheless prevail on its statutory argument. Yankee Atomic argues that the Energy Policy Act applies only to "domestic utilities," and that the meaning of that term is provided by the following language:

> Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

42 U.S.C. § 2297g-1(g). Yankee Atomic argues that this language plainly indicates that "domestic utility" encompasses only those utilities that are currently generating and selling electricity. Because Yankee Atomic ceased operation eight months before passage of the Act, it is not a "domestic utility." As a result, Yankee Atomic asserts that the entire assessment, including that levied on Yankee Atomic's purchase in the secondary market, would constitute an unlawful exaction. We disagree with this argument.

The plain language of the Energy Policy Act explains which utilities are covered by its scope. The Act clearly states that "[t]he Secretary shall collect a special assessment from domestic utilities." 42 U.S.C. § 2297g-1(c). The Act further states that a utility is responsible for contribution to the Decontamination and Decommissioning

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Government's action directly abrogated prior vested contractual rights. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2455 (stating that "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and citing *Perry* and *Lynch*).

Fund if it purchased uranium enrichment services from the DOE, either directly or indirectly, but utility company [sic]. 42 U.S.C. §§ 2297g-1(c)(1), (2). Thus, the plain language of the statute sets the parameters of its scope. Because Yankee Atomic purchased uranium enrichment services from the DOE, both directly and indirectly, it falls within the Act's scope.

The provision cited by Yankee Atomic, § 2297g-1(g), does not contradict this plain meaning. That provision merely addresses the issue of how the special assessment should be treated in determining utility rates. By defining the assessment as a current cost of fuel, Congress clears the path for the domestic utilities to pass through the assessment to current customers. This avoids any complications from the Federal Energy Regulatory Commission, which has ruled that although customers can be charged for current fuel costs, they cannot be charged for certain prior costs. *See, e.g., Northern States Power Co.*, 58 FERC ¶ 61,119 (Feb. 6, 1992). Section 2297g-1(g) does not, however, *sub silentio* create an exception which takes certain utilities out of the reach of the assessment.

Therefore, we conclude that Yankee Atomic is not exempt from the assessment by virtue of its nonoperating status at the time the Act was passed. The Act plainly defines the scope of the assessment, and Yankee Atomic has not cited any contrary intention by Congress.

VII

In conclusion, the provision of the Energy Policy Act which imposes the special assessment is a sovereign act because it is designed to spread the costs associated with the decontamination and decommissioning over all domestice utilities that used the DOE's uranium enrichment services, rather than targeting only those utilities that had contracts with the Government. Moreover, the contracts between Yankee Atomic and the Government did not con-

tain an unmistakable promise which precluded the Government from exercising this sovereign power. Finally, Yankee Atomic is not exempt from the assessment by virtue of the fact that it ceased operations before the Act's passage. Accordingly, the judgment of the Court of Federal Claims is reversed.

No costs.

REVERSED.

MAYER, Circuit Judge, dissenting.

More than a century ago, the Supreme Court held that the government cannot deprive a party with which it contracts "of the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879); *see also Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55, 106 S.Ct. 2390, 2398, 91 L.Ed.2d 35 (1986). In levying the special assessments required by 42 U.S.C. § 2297g-1 against Yankee Atomic Electric Company (Yankee), the government improperly diminished the value of Yankee's contractual "fruits." The Court of Federal Claims held that this was an "unlawful exaction," and I agree. I would affirm.

The parties do not dispute that the contracts at issue were fixed-price contracts. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918); *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed.Cir.1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). As the seller of uranium enrichment services, the government bore the risk of any unforeseen difficulties or increased costs that might arise out of its performance of the contracts.

The parties also agree that the contracts were fully and satisfactorily performed. Once a contract is completed, the contractual relationship ends and there is no privity between the parties. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167-68 (Fed.Cir.1994); *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1541 (Fed.Cir.1987).

Consequently, Yankee cannot prevail on its claim that the government breached the contracts at issue years after they were finished. *See Mulholland v. United States*, 175 Ct.Cl. 832, 361 F.2d 237, 239-40 (1966) (at the latest, a breach of contract claim accrues when the contract is completed); *cf. Henke v. United States*, 60 F.3d 795, 799-800 (Fed.Cir.1995).

Contracts, however, are property, "whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment" of the United States Constitution. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); *see also Bowen*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (the government "has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984) ("[V]alid contracts are property within meaning of the Taking Clause."); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 278 n. 31, 89 S.Ct. 518, 524 n. 31, 21 L.Ed.2d 474 (1969). The Fifth Amendment prohibits the federal government from depriving a person of property "without due process of law" and from taking private property "without just compensation." U.S. Const. amend. V; *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843; *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980) (where state collected a service charge, subsequently-imposed fee for the same service was an unconstitutional taking).

The government does not contend that its contracts with Yankee were invalid. So, there can be no doubt that once Yankee's contracts had been satisfactorily performed, its rights under those contracts were fully-vested property rights. Consequently, the government cannot deprive

Yankee of the benefits of those contracts. *See Sinking Fund Cases*, 99 U.S. at 720.

To ascertain Yankee's vested property rights, we must look to the contracts themselves. The bargain struck between the government and Yankee was simple. The government, through the Atomic Energy Commission and its successor agencies, was to provide uranium enrichment or separation services for Yankee. In return, Yankee was to pay a fixed price per separative work unit, the common measure by which uranium enrichment services are sold. Between 1963 and 1983, Yankee purchased approximately 804,000 separative work units at prices ranging from less than $26 to more than $149 per unit. Because of the fixed-price nature of these contracts, Yankee was entitled to pay no more than the agreed-upon price. The government, on the other hand, was assigned the risk for any unforeseen difficulties that might arise or the risk that actual performance costs would be higher than the contract price.

The sole basis upon which Congress imposed the special assessments which Yankee seeks to recover is that Yankee had purchased uranium enrichment services from the government. These assessments were calculated based on the percentage of the total separative work units produced by the government which Yankee had purchased directly. This is tantamount to a retroactive price increase. It levies a charge on Yankee solely because it had previously purchased enrichment services from the government. But those purchases were made via fixed-price contracts. The assessment effectively requires Yankee to pay for the additional costs the government incurred as a result of performing uranium enrichment services; the very same costs for which the government assumed the risk. Thus, the government retroactively abrogated the essence of the contracts at issue. "But Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to

lessen government expenditure would be not the practice of economy, but an act of repudiation." *Perry*, 294 U.S. at 352-53, 55 S.Ct. at 436.

It is of no moment that the reason for the assessment is to relieve the government from shouldering entirely the unforeseen costs incurred in providing those services, from which Yankee had benefited. Yankee fully paid the government for those benefits, and as the seller of the enrichment services, the government bore the burden for any unforeseen costs. The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *cf. United States v. Winstar Corp.*, —— U.S. ——, ——, 116 S.Ct. 2432, 2459, 135 L.Ed.2d 964 (1996) (the government may not "simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change").

Nor is it of any great import that the assessment is levied on some utilities that did not contract directly with the government. First, that is not the case before us. Yankee seeks to recover only assessments based on its direct purchases from the government. It does not challenge charges based on secondary market purchases, which, according to the government at argument, constitute just 15% of the total assessments. Moreover, the same argument, that legislation was not targeted solely at those with whom the government had contracted, was made by the government and rejected by the Court in *Winstar*. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." —– U.S. at ——, 116 S.Ct. at 2468. The government

concedes that 85% of the special assessment falls on utilities that had procured enrichment services directly from the government. Clearly then, the assessment's impact falls substantially on the government's contracting partners. That a small fraction of others who indirectly purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.

The government invokes the familiar sovereign acts and unmistakability doctrines in support of its position that the special assessment did not abrogate Yankee's vested contract rights. Neither shields the government.

The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). "[T]he essential point [of the doctrine is] to put the Government in the same position that it would have enjoyed as a private contractor." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2463. This doctrine is wholly inapplicable. Properly understood, it is a government defense to breach of contract and other contractor claims that a governmental act adversely affected contract performance. But this is not a breach of contract case. Nor did Congress' enactment of the special assessment obstruct performance of the contracts, as contemplated by *Horowitz*. The contracts were fully and successfully performed by both parties. But even assuming the doctrine applied, it would not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2469 ("[T]he extent to which [the legislation there at issue] relieved the Government of its own contractual obligations precludes a finding that the

statute is a 'public and general' act for purposes of the sovereign acts defense.").

The unmistakability doctrine, on the other hand, is simply a "canon of contract construction," *Winstar*, —— U.S. at ——, 116 S.Ct. at 2448, which says that "a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress)," *id.* at ——, 116 S.Ct. at 2456. Its application "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power," such as the power to tax. *Id.* at ——, 116 S.Ct. at 2457. But this doctrine too is inapplicable. It is not enforcement of a "contractual obligation," per se, that is at issue. Rather, Yankee seeks reimbursement for the improper abrogation of its vested property rights, which happened to arise out of the completed contracts. That is, it seeks money damages for the government's deprivation "of the fruits actually reduced to possession" of the contracts at issue. *See Sinking Fund Cases*, 99 U.S. at 720.

Even assuming, for the sake of argument, the unmistakability doctrine applied, it adds little. The parties agree that the contracts, out of which Yankee's property rights arose, had fixed prices and that the government bore the risk of unforeseen costs that might arise. They merely disagree about the legal consequences that flow from this interpretation. But Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike. It did not need an additional, second promise not to have the contract price increased after completion. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2461 (there is "no need for an unmistakably clear 'second promise' "); *id.* at ——, 116 S.Ct. at 2477 (Scalia, Kennedy, Thomas, JJ., concurring) (there need be no "*further* promise not to go back on the promise" made).

That is not to say that Yankee would be immune from every assessment or tax relating to decontaminating and decommissioning the government enrichment facilities, no matter how general or broad its application, solely because it had a fixed-price contract. But where, as here, the impact of the tax falls so substantially and directly on Yankee and the government's other contracting partners, it amounts to a retroactive price increase, which cannot stand.

When the government improperly exacts or takes one's money " 'in contravention of the Constitution, a statute, or a regulation,' " an illegal exaction has occurred, and the payor is entitled to recoupment. *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1572-73 (Fed.Cir.1996); *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). In other words, "an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' " *Aerolineas Argentinas,* 77 F.3d at 1573 (quoting *Clapp v. United States,* 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (1954)). The government has Yankee's money in its pocket. It illegally exacted that money in contravention of Yankee's rights under the Fifth Amendment. Yankee is entitled to recover it.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5021

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

JUDGMENT

On Appeal from the United States Court of Federal Claims *in Case No(s).* 94-555

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED

DATED May 6, 1997

ENTERED BY ORDER
OF THE COURT

/s/ Jan Horbaly
JAN HORBALY
Clerk

ISSUED AS A MANDATE: August 22, 1997

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 94-555 C

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

June 22, 1995

OPINION

WIESE, Judge.

Title 42 of the United States Code, section 2297g-1(c) (1988 & Supp. IV 1992), authorizes the Secretary of Energy to collect a special annual assessment from those domestic utilities which, in prior years, had utilized enriched uranium, produced by the Government, as a fuel in the operation of their nuclear-powered electricity generating facilities. The assessment is paid into a fund intended to meet the costs of decontaminating and decommissioning the industrial facilities that the Government used in producing the enriched uranium.

Plaintiff is among the utilities subject to this special assessment; its suit here seeks recovery of a portion of the approximately $3,000,000 it has thus far paid the Government.[1] Three theories of recovery are advanced. First,

[1] The statute authorizes the assessment to be calculated on the basis of all Government-produced enriched uranium utilized by a

plaintiff maintains that the assessment amounts to a breach of contract, in that it retroactively increases the cost of the Government's uranium enrichment services, thereby violating the "fixed-price" character of the contracts under which those services initially were obtained. Second, even if imposition of the assessment does not amount to a breach of contract, plaintiff claims, it constitutes the deprivation of a contract-based advantage and hence, the taking of a property right. Finally, putting both contract and taking theories aside, plaintiff argues that Congress intended the assessment to apply only to those domestic utilities able to recover the cost involved through their rate base, that is, as a pass-through of a necessary and reasonable cost of fuel. And inasmuch as plaintiff ceased operations in early 1992, some eight months prior to the passage of the legislation authorizing the special assessment, it argues that the assessment represents an unlawful exactitude.

Defendant disagrees with these contentions; it maintains that the assessment represents a legitimate exercise of legislative authority that does not transgress plaintiff's contract rights or implicate the Takings Clause of the Fifth Amendment or violate the terms of the statute authorizing the special assessment.

Both sides have moved for summary judgment supported by written briefs, later supplemented by oral argument. At the conclusion of the argument, heard June 1, 1995, the court issued a tentative ruling in plaintiff's favor and indicated its intention to address the issues more completely in a written decision. This opinion proceeds in accordance with the court's earlier ruling.

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domestic utility, whether purchased from the Government directly or from secondary market sources. 42 U.S.C. § 2297g-1(c)(1). In this suit, however, plaintiff seeks repayment only of that portion of the annual assessment attributable to its direct purchases from the Government pursuant to contracts entered into in 1963, 1969, and 1971.

FACTS

Until the shutdown of its operations in early 1992, plaintiff operated as a domestic utility engaged in the wholesale distribution of electrical power generated from nuclear fuels. The company, located in Rowe, Massachusetts, was organized in 1954 by a number of existing electric utility companies to facilitate their joint participation in the then-emerging use of atomic energy as an alternate-source fuel for the generation of electricity. The electricity produced by plaintiff was sold to its shareholder members (the organizing utilities) for redistribution to retail customers, both residential and commercial.

In the conduct of its business, plaintiff purchased uranium enrichment services from the Government. These purchases, which began in 1963, were carried out through successive multi-year contracts between plaintiff and the Atomic Energy Commission (AEC) and successor agencies, including the Department of Energy (DOE). Although the types and terms of the contracts varied over time, their constant feature was a pricing provision which set the charge for the Government's services in accordance with "established Commission pricing policy," that is, at the price in effect at the time the service was provided, subject, however, to a stated maximum amount.

Typical of this contract language was the provision that appeared in the "Agreement For Furnishing Uranium Enrichment Services" which the parties executed on March 9, 1971. Article III of this agreement specified in relevant part that:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement

> shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

The term "established Commission pricing policy" was defined in the contract to mean "any applicable price or charge in effect at the time of performance of any services under this agreement (i) published by the Commission in the Federal Register for material or services subject to this agreement, or (ii) in the absence of such a published figure, determined in accordance with the Commission's Pricing Policy. . . ."

The regulatory agencies involved in managing the Government's uranium enrichment program (the Atomic Energy Commission and successor agencies), either failed to price, or were competitively disabled from pricing, their services high enough to pay for the future cleanup of the radiation contamination at the facilities where the enrichment services were being performed. H.R.Rep. No. 474, 102d Cong., 2d Sess., pt. I, at 142, 144; pt. VIII, at 76, 78 (1992), *reprinted in* 1992 U.S.C.C.A.N.1953, 1965, 1967, 2294, 2296.

This problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (the Act). Specifically, Title XI of the Act (106 Stat. 2951) amended the Atomic Energy Act of 1954 to provide, *inter alia*, for the creation of a fund—the Uranium Enrichment Decontamination and Decommissioning Fund—to accumulate, over a fifteen year period, the monies necessary for the cleanup costs of the uranium enrichment plants. (This amendment is now codified at 42 U.S.C. § 2297g.) The Act further provided that contributions to the fund, amounting to $480,000,000 annually, were to come from two sources: up to $150,000,000 annually was to be

collected by "special assessment" from domestic utilities; the balance, from general appropriations. The Act also provided that each domestic utility's share of the total annual assessment was to be determined on a per-unit basis (called a separative work unit) representing the measure of that utility's past use of uranium enrichment services provided by the Government. (This amendment is now codified at 42 U.S.C. § 2297g-1.)

Following passage of the Act in October 1992, the Department of Energy proceeded to assess plaintiff a share of the annual special assessment. Plaintiff took the position that it was not liable for the assessment because it no longer was an operating utility—the Rowe, Massachusetts facility having been shut down permanently in February 1992—and therefore did not come within the intended reach of the Act. Essentially, it was plaintiff's view that because the Act specifically authorized recovery of the special assessment through a utility's rate base, it necessarily contemplated an assessment that was meant to apply only to operating utilities.[2]

DOE rejected the position urged by plaintiff. The Agency concluded that the Act applied to all utilities that had used government-enriched uranium in their generating facilities without regard to their current operating status. The Agency saw the statutory language relied on by plaintiff as simply an accounting authorization designed to overcome the potential rate-making problems inherent in having present utility consumers bear costs more logically assignable to past consumption.

---

[2] The argument was founded on the language of 42 U.S.C. § 2297g-1(g), a section titled "Treatment of Assessment." That language reads as follows:

> "Any special assessment levied under this section . . . shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost."

On August 19, 1994, four days after the rejection of plaintiff's bid for exemption, plaintiff filed suit in this court. As of that date, the Government had collected from plaintiff, pursuant to the authority of 42 U.S.C. § 2297g-1, three annual assessments amounting to approximately $3,000,000.00. Plaintiff seeks recovery of a portion of this sum together with interest, costs and attorneys' fees.

DISCUSSION

Our analysis of this case begins with the rule that contracts with the United States, like contracts between private parties, "remain subject to subsequent legislation by the presiding sovereign." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982). As the Court explained in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain unless surrendered in unmistakable terms.' " *Id.* at 52, 106 S.Ct. at 2397 (quoting *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907). Thus, "one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C.Cir.1992) (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)).

But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation, exercise of the sovereign power does not proceed unchecked. That power, the Court has also declared, may not be relied upon to "take away property already acquired under the operation of [a contract], or to deprive [a] corporation of the fruits actually reduced to possession of contracts lawfully made."

Bowen, 477 U.S. at 55, 106 S.Ct. at 2398 (quoting *Sinking-Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496, 25 L.Ed. 504 (1878)). And, as the *Bowen* decision further points out, in other decisions the Court has held "that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money." *Id.* Cited in support of this proposition are the decisions in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) and *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).

There are, then, recognized limits upon Congress' power to enact legislation that impairs rights created under contracts with the Government. The question is whether those limits have been exceeded here. Is this a case in which the Government's actions amount to a deprivation of property "already acquired"? The answer is yes.

The several contracts between plaintiff and the United States were essentially requirements-type contracts under the terms of which plaintiff had the right to order uranium enrichment services from the Government at published market prices that were not to exceed a stated per-unit amount. Significantly, those contracts contained no provision permitting the Government to reprice its services if, upon a post-performance evaluation, the prices charged were found to have been too low. Nor would such a provision have been called for. It was the AEC's mandate from the start to price its services so as to assure "reasonable compensation to the Government." Act of August 26, 1964, Pub.L. No. 88-489, 78 Stat. 602, 606 (1964) (formerly codified at 42 U.S.C. § 2201(v)(B) (1964); current version at 42 U.S.C. § 2201(v) (1988 & Supp. IV 1992)). Subsequent legislation made clear that this pricing standard was intended to accomplish a "recovery of the Government's costs over a reasonable period of time." Act of December 14, 1970, Pub.L. No. 91-560,

84 Stat. 1472, 1474 (1970) (formerly codified at 42 U.S.C. § 2201(v)(B) (1970); current version at 42 U.S.C. § 2201(v) (1988 & Supp. IV 1992)). In short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services.

Given this statutory background and the fixed-price character of the Government's undertaking, plaintiff was justified in concluding that, upon payment to the Government for services ordered, the transactions involved would become final. That conclusion is founded on the principle that one who undertakes to perform at a fixed price thereby assumes the burden of all unanticipated costs. *United States v. Spearin*, 248 U.S. 132, 135-36, 39 S.Ct. 59, 60-61, 63 L.Ed. 166 (1918). Simply put, the Government bargained away the right to demand additional compensation from plaintiff (for the same services) to meet risks not foreseen at the time the contracts were made. Correspondingly, the economic benefit which plaintiff gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away. *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843-844 ("Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.")

The Government endeavors to avoid this result by claiming that the special assessment represents an exercise of the sovereign's taxing power and, as such, cannot be abridged in favor of private contract rights. We do not accept this contention. The argument would have some force if we were dealing with a general tax that fell on all utilities alike. That, however, is not our case. Rather, this special assessment reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services, and it taxes them according to the number of separative work units purchased. Clearly, then, the assessment is

an add-on to the price previously paid to the Government. Thus, by imposing the assessment in the manner here described, the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power. "The doctrine of 'public and general' 'sovereign acts', laid down in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925), does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 162 Ct.Cl. 390, 402, 320 F.2d 359, 366 (1963).

Indeed, the Government's actions are tantamount to an abrogation of contract rights akin to that declared unlawful in *Perry* and *Lynch*. In *Perry* the Court struck down, as beyond congressional power, a joint resolution of the Congress that included language repealing the Government's obligation to repay its bondholders in gold coin. And in *Lynch*, the Court found a similar want of authority in Congress' attempted repeal of the Government's obligation to pay in accordance with the terms of a war-risk insurance policy. Though, in each case, the action taken by the Government was prompted by concerns for the Nation's economy and the need to save money, this reason was held insufficient to sanction the extinguishment of vested contract rights. The reasoning went as follows:

> No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations

> of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. 700, 719.

Lynch v. United States, 292 U.S. at 580, 54 S.Ct. at 844.

During the oral argument of the case, counsel for the Government sought to distinguish *Perry* and *Lynch* on the ground that there the content of the promises undertaken by the Government was spelled out in statute [3] whereas here the substance of the commitment was determined by an Executive agency. In counsel's view, only the former can give rise to a vested right; the latter, it is argued, remains subject to the risk of impairment by subsequent legislation unless secured against that possibility by specific protective language.

We do not accept this distinction. A contract with the United States is not of lesser dignity because its terms originate in Executive judgment rather than legislative prescription. Commitments made by the Executive, when authorized by statute, are no less sovereign in character than commitments made by the Legislature itself. It is not the source of the Government's promise that determines the existence of a vested right, but the extent to which the bargain between the parties has been carried out. A contract that has been performed to the extent of giving

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[3] The statutory authorizations underlying the obligations addressed in *Perry* and *Lynch* are, respectively, Act of September 24, 1917, ch. 56, 40 Stat. 288 (authorizing issuance of war bonds) and Act of October 6, 1917, ch. 105, 40 Stat. 398 (establishing Bureau of War Risk Insurance).

the Government all that it bargained for creates a vested right in the other party to the return performance promised by the Government. *Texas Pacific Coal & Oil Co. v. Honolulu Oil Corp.*, 241 F.2d 920, 922 (5th Cir.1957).

Similarly, when a contract between citizen and Government is fully performed on each side, the resulting exchange of values amounts in substance to an exchange of property interests. The interests acquired become vested interests—the "fruits actually reduced to possession of contracts lawfully made," *Sinking-Fund Cases*, 99 U.S. at 720, that are entitled to protection under the Takings Clause of the Fifth Amendment. *Lynch v. United States*, 292 U.S. at 579, 54 S.Ct. at 843-844.

CONCLUSION

For the reasons stated, the court concludes that, as applied to plaintiff, the special assessment amounts, in part, to an unlawful exaction because it violates the Government's earlier commitments to supply enriched uranium at contract prices not to exceed a stated amount and thus improperly diminishes the value of the property (the economic advantage) that plaintiff acquired pursuant to those commitments. Plaintiff is entitled to the benefit of its bargain; hence, those portions of the annual assessments that relate to plaintiff's 1963, 1969, and 1971 contract purchases of enriched uranium from the Government must be refunded together with interest. The amount of the judgment to be entered shall be based on a stipulation to be filed by the parties within 30 days from the date of this opinion.[4]

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[4] In view of the conclusion reached, we deem it unnecessary to address plaintiff's separate contention that the special assessment was intended only to apply to operating utilities.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5021, -5025

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the CROSS-APPELLANT, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDER TION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 22, 1997.

Circuit Judge NEWMAN would rehear the appeal in banc.

Five Briefs were filed by Amici Curiae.

FOR THE COURT,

JAN HORBALY
Clerk

Dated: August 15, 1997

By /s/ Alex Van Veen
ALEX VAN VEEN
Staff Law Clerk

APPENDIX D

STATUTORY PROVISIONS

1. Section 2297g of Title 42, U.S.C., provides in relevant part:

§ 2297g. Uranium Enrichment Decontamination and Decommissioning Fund

(a) Establishment

There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this subchapter as the "Fund"). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this subchapter.

2. Section 2297g-1 of Title 42, U.S.C., provides:

§ 2297g-1. Deposits

(a) Amount

The Fund shall consist of deposits in the amount of $480,000,000 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

(b) Source

Deposits described in subsection (a) of this section shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

(c) Special assessment

The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before October 24, 1992. For purposes of this subsection—

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

(d) Authorization of appropriations

There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

(e) Termination of assessments

The collection of amounts under subsection (c) of this section shall cease after the earlier of—

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

(f) Continuation of deposits

Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

(g) Treatment of assessment

Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

3. Section 2297a of Title 42, U.S.C., provides in relevant part:

§ 2297a. Purposes

The Corporation is created for the following purposes:

(1) To operate as a business enterprise on a profitable and efficient basis.

(2) To maximize the long-term value of the Corporation to the Treasury of the United States.

* * * *

(7) To conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or sources of Federal financing other than those provided in this division.

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

No. 97-801

In the Supreme Court of the United States

OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In order to provide some of the funds needed to decontaminate Department of Energy uranium enrichment facilities, Congress imposed a special assessment on those domestic nuclear utilities that had purchased, either from the Department of Energy directly or in the secondary market, the uranium enrichment services that caused the contamination. 42 U.S.C. 2297g, 2297g-1. The question presented is: Whether application of the assessment to utilities that purchased the uranium enrichment services pursuant to fixed-price contracts breaches those contracts or violates the utilities' due process rights.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 112 F.3d 1569. The opinion of the Court of Federal Claims (Pet. App. 33a-43a) is reported at 33 Fed. Cl. 580.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. Pet. App. 32a. A petition for rehearing was denied on August 15, 1997. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on November 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress created a "comprehensive national energy policy" designed "to implement solutions to our nuclear waste and uranium enrichment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was the fact that existing uranium enrichment plants, which the Department of Energy (DOE) had used to provide enrichment services to domestic utility companies since the 1950s, needed to be decontaminated and decommissioned.

Testifying before the House Ways and Means Committee in support of the cleanup effort, representatives of domestic nuclear utilities expressed their approval of a special assessment on those domestic utilities that had purchased the contaminating uranium enrichment services, but suggested that the term of the special assessment be limited to 15 years or the time necessary to collect $2.5 billion, whichever came first. See *Comprehensive National Energy Policy Act: Hearing Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 178-183 (1992). Supporters of that proposal included the Edison Electric Institute, of which petitioner was a member. *Ibid.*

Sections 1801 and 1802 of the Atomic Energy Act of 1954, as added by the Energy Policy Act of 1992 (Energy Policy Act), Pub. L. No. 102-486, § 1031, 106 Stat. 2953-2954, codified at 42 U.S.C. 2297g and 2297g-1, establish a Uranium Enrichment Decontamination and Decommissioning Fund to accumulate the funds necessary for the cleanup of the uranium enrichment facilities. The Fund is derived primarily from congressional appropriations, supplemented by a

limited annual special assessment collected from the utility companies that purchased and used the contaminating uranium enrichment services. The determination of the utilities to be assessed, and the amount to be assessed from each, depends upon the share of the uranium enrichment services that each utility purchased and did not resell. Thus, for example, if a utility had purchased five percent of the contaminating uranium enrichment services, that utility would be assessed five percent of the annual special assessment, unless the utility had later resold the services, in which case the services would be counted toward the purchasing utility's *pro rata* share and deducted from the selling utility's share. 42 U.S.C. 2297g-1(c). The special assessment terminates after the earlier of 15 years or the collection of $2.25 billion. 42 U.S.C. 2297g-1(e). Each utility that is subject to the assessment is authorized to count the assessed amounts as a "necessary and reasonable current cost of fuel," which is thus "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. Petitioner is a utility company formed by several domestic utilities for the purpose of owning and operating a nuclear-powered electricity-generating plant in Massachusetts. Between 1960 and 1983, petitioner purchased uranium enrichment services for its plant from the DOE pursuant to a series of fixed-price contracts. Pet. App. 2a.

Petitioner paid approximately $3 million in assessed amounts under the Energy Policy Act and filed suit in the Court of Federal Claims to recover its payments. Pet. App. 4a. Petitioner alleged that the special assessment breached its fixed-price contracts and constituted a taking of its property for

which it was entitled to compensation under the Fifth Amendment. Petitioner further claimed that it was not subject to the special assessment because it did not fall within the scope of the term "domestic utility" under 42 U.S.C. 2297g-1(c) and (g). Pet. App. 33a-34a.

After the parties filed cross-motions for summary judgment, the Court of Federal Claims held that the special assessment breached petitioner's fixed-price contracts with the government. Pet. App. 33a-43a. The court accordingly ordered the government to refund petitioner's special assessment payments. *Id.* at 43a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-31a. The court initially observed that, although petitioner had argued that the special assessment breached its contracts with the government, the case "d[id] not appear to * * * involv[e] a breach of contract," because the contracts upon which petitioner premised its claim were "fully performed by both parties." *Id.* at 6a n.2.

Although concluding that a contract claim was unavailable, the court nonetheless addressed and rejected petitioner's contention that its contracts with the government constrained Congress's power to impose the special assessment. Pet. App. 6a-21a. The court held that the special assessment was a valid exercise of Congress's sovereign power. *Id.* at 6a-14a. The court explained that Congress enacted the special assessment to address the problem of contamination in uranium enrichment plants, and not for the purpose of retroactively increasing the price in the government's previous contracts with petitioner. *Id.* at 9a. The court further reasoned (*id.* at 10a) that the Energy Policy Act applies not only to those utilities

that had entered into contracts with the government, but also to utilities that had purchased government-enriched uranium from other utilities. See 42 U.S.C. 2297g-1(c)(1). Conversely, the court explained (Pet. App. 10a) that the Act does not apply to utilities that contracted with the DOE if those utilities resold the services to another utility. See 42 U.S.C. 2297g-1(c)(2).

The court then addressed the question whether the government, in "unmistakable" terms, had surrendered its right to exercise its sovereign authority to adopt the special assessment. Pet. App. 14a-21a. The court examined the language of the contracts and concluded that "the fixed-price terms of the contract[s] do not constitute an unmistakable promise on behalf of the government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services." *Id.* at 20a. The court explained that, although the contracts assured petitioner that the government would "provid[e] the enriched uranium at the agreed-upon price," the Energy Policy Act's special assessment "is not a deliberate retroactive increase in the price of those contracts." *Ibid.* "Instead," the court continued, the assessment "is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government." *Ibid.*

The court also rejected petitioner's claim under the Just Compensation Clause. Pet. App. 21a n.8. The court observed that, because petitioner's contracts did not expressly or implicitly touch upon the subject of the cleanup costs that might arise when the enrich-

ment facilities were closed, petitioner's contracts created no vested property rights in regard to that subject which could be "taken" by the special assessment. *Ibid.*[1]

Judge Mayer dissented. Pet. App. 25a-31a. He agreed with the panel majority's conclusion that petitioner could not prevail on its breach-of-contract theory because "the contracts were fully and satisfactorily performed." *Id.* at 25a. In his view, however, the special assessment violated what he believed to be vested rights of petitioner under the fixed-price contracts and constituted an uncompensated taking. *Id.* at 26a-28a. The dissent also expressed the view that neither the "sovereign acts" doctrine nor the "unmistakability" doctrine applied in this case. *Id.* at 29a-31a.

ARGUMENT

The court of appeals correctly concluded that the Energy Policy Act's special assessment does not breach petitioner's fully performed contracts with the government. Even assuming that petitioner's claim had some basis in the law of contracts, however, the decision below correctly holds that petitioner's claim is barred by the "sovereign acts" and "unmistakability" doctrines. Petitioner's remaining due process claim is not properly before this Court and would not merit this Court's attention in any event.

1. Petitioner renews (Pet. 7-16) its contention that the Energy Policy Act's special assessment violated petitioner's contracts with the government by retro-

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[1] The court also rejected petitioner's claim that it did not fall within the scope of the statutory term "domestic utility." Pet. App. 22a-23a. Petitioner does not challenge that holding in this Court.

actively increasing the price of services purchased under those contracts. Petitioner also argues (*ibid.*) that this Court's review is warranted to consider the court of appeals' application of the "sovereign acts" and "unmistakability" doctrines. Those contentions lack merit.

As the court of appeals correctly observed (Pet. App. 6a n.2), no contract claim for breach may be brought pursuant to contracts that have already been fully performed. See also *id.* at 25a (Mayer, J., dissenting) ("The parties * * * agree that the contracts were fully and satisfactorily performed."). After a contract is fully performed and the contractual relationship ends, the parties may no longer bring contract-based actions against one another. See, *e.g.*, *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987); *Mulholland* v. *United States*, 361 F.2d 237, 239-240 (Ct. Cl. 1966). Thus, although the court proceeded to discuss the "sovereign acts" and "unmistakability" doctrines, petitioner's contract claim properly could have been rejected without recourse to those doctrines. Those doctrines are defenses against attempts to hold the government to its contractual obligations, or to recover for breach of those obligations. See, *e.g.*, *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2448 (1996) (opinion of Souter, J.). When, as in the present case, the government has fulfilled its contractual obligations, no action for breach of contract may be brought, and thus no such defenses are necessary.[2]

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[2] Even if the government's contracts with petitioner had not yet been fully performed, petitioner has presented no legal support for its assertion (Pet. 9-16) that the fixed-price terms in its contracts incorporated the costs related to dealing with

Accordingly, further review of the court of appeals' discussion of those defenses is unwarranted.

2. In any event, the court of appeals correctly held that the "sovereign acts" and "unmistakability" doctrines would bar petitioner's contract claim, if such a claim otherwise would lie with respect to petitioner's completed contract.

a. Petitioner contends (Pet. 9-16) that the decision below improperly applied the "sovereign acts" doctrine because the special assessment substantially affects the government's contracting parties. Petitioner relies (Pet. 11), however, on the portion of the plurality opinion in *Winstar* in which only two other Justices joined. 116 S. Ct. at 2466-2467 (opinion of Souter, J.). In any event, the reasoning of the *Winstar* plurality would not bar the application of the "sovereign acts" doctrine here because the Energy Policy Act bears none of the indicia of a "governmental object of self-relief" (*id.* at 2465) that the three Justices found present in *Winstar*. See *id.* at 2467 ("The statute not only had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised, but the specific object of abrogating enough of the acquisition contracts as to make that consequence of the legislation a focal point of the congressional debate.").

Moreover, as the court of appeals explained, "some utility/Government contracts are not embraced by

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any environmental or other hazards that production engendered, or that the government promised to indemnify petitioner for any liability for such costs. Cf. Pet. App. 20a ("The language of the contract[s] is directed at the prices charged for providing enriched uranium to [petitioner], and not to any decontamination or decommissioning costs which subsequently may arise.").

the Act, while some purchases from private entities are covered." Pet. App. 10a. The court of appeals further explained that "[t]he reach of the Act * * * makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements." Instead, "the Act targets whichever utility eventually used and benefited from the DOE's enrichment services." *Ibid.* Unlike the congressional action in *Winstar*, 116 S. Ct. at 2467-2469 (opinion of Souter, J.), petitioner points to nothing in the legislative history that indicates that Congress intended to alter the terms of petitioner's contracts. Accordingly, the court of appeals correctly concluded that the Energy Policy Act's impact "on those utilities with which the Government had prior contracts is 'merely incidental to the accomplishment of a broader governmental objective.'" Pet. App. 10a-11a (quoting *Winstar*, 116 S. Ct. at 2466 (opinion of Souter, J.)).

b. The court of appeals also correctly concluded (Pet. App. 14a-21a) that the "unmistakability" doctrine would bar any contract claim petitioner might have. Petitioner seeks an "exemption from the terms of [a] statute," and such a claim "could not be recognized without effectively limiting sovereign authority." *Winstar*, 116 S. Ct. at 2457 (opinion of Souter, J.). Petitioner seeks the return of all the money it paid the government under the special assessment—a remedy identical to an injunction against application of the law to it—and thus must overcome the "unmistakability" doctrine in its strongest form.[3]

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[3] The application of the "unmistakability" doctrine in this case is also supported by both concurring opinions in *Winstar*. Both Justice Breyer's and Justice Scalia's concurring opinions

Petitioner's sole attempt to overcome the "unmistakability" doctrine consists of its assertion (Pet. 12) that its fixed-price purchase contracts with the government impliedly promised that the government would not "*release* itself from contractual liability simply by enacting legislation that is principally *directed* at its own contracts." As explained *supra*, however, the Energy Policy Act has not rendered impossible the government's performance under its contracts, because the government already has fulfilled its side of the bargain by providing petitioner with enriched uranium at the price fixed under its contracts. See Pet. App. 6a n.2, 25a. Similarly, the Act is not directed at changing the terms of petitioner's fixed-price contracts, but rather applies to all utilities that benefited from the enriched uranium services provided by the DOE. *Id.* at 10a-11a. Nothing in petitioner's contracts reflects an "unmistakable" statement by the government surrendering its sovereign authority to impose a special assessment on those domestic utilities that purchased the contaminating uranium enrichment services either directly from the DOE or from other utilities.

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expressed the view that the "unmistakability" doctrine reflects ordinary principles of contract interpretation. See 116 S. Ct. at 2472-2476 (Breyer, J., concurring); *id.* at 2477 (Scalia, J., concurring in the judgment). In the present case, there is no express contract term that overcomes the presumption that "[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers." *Ibid.* Indeed, the promise alleged by petitioner—that the government alone would incur all costs involved in decommissioning and decontaminating enrichment plants—is simply "*not mentioned* in the contract[s] at issue." *Id.* at 2474 (Breyer, J., concurring).

3. Petitioner also contends that the Energy Policy Act violates the Due Process Clause of the Fifth Amendment. Petitioner argues (Pet. 16-19) that the special assessment violates the Due Process Clause because it retroactively imposes costs upon petitioners that the government assumed under its prior contracts with petitioner. Petitioner further argues (Pet. 17-18) that the Act imposes a financial obligation based on conduct by petitioner that is insufficiently connected to the purpose for which the money is collected.[4] Petitioner did not, however, press either of those contentions below. Accordingly, those issues are not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or involved in the lower court."); accord *Auer* v. *Robbins*, 117 S. Ct. 905, 912 (1997); *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 n.** (1995); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).[5]

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[4] Petitioner errs in asserting (Pet. 17-18, 21 n.17) that this case raises a question similar to the due process question presented in *Eastern Enterprises* v. *Appel*, cert. granted, 118 S. Ct. 334 (1997) (No. 97-42), and thus should be held pending the Court's decision in that case. Petitioner acknowledges (Pet. 17) that it purchased and used the uranium enrichment services that created the contamination. Thus, the question framed in *Eastern Enterprises*—whether activity may later be made the subject of financial obligations if that activity "did not contribute" to the public problem that the money is collected to address (97-42 Pet. i)—is not present in this case.

[5] Petitioner did argue below that the special assessment amounts to a taking of property for which compensation is due. Pet. App. 21a n.8. Petitioner does not, however, renew that contention in this Court.

In any event, petitioner's due process arguments are without merit. Petitioner's assertion (Pet. 18) that the special assessment unconstitutionally makes petitioner responsible for the government's "*own* financial liabilities" merely restates its contract claim, which, as discussed *supra*, has no legal or factual support. Petitioner's argument (Pet. 16-19) that the special assessment is unconstitutional because it imposes financial obligations upon entities that are not responsible for the problem underlying the legislation, or because it is based upon conduct excessively far into the past, is similarly without merit.

It is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). That presumption is not overcome by the mere fact that legislation has "upset[] otherwise settled expectations," or that "the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16. As long as the legislation's retrospective aspects are supported by separate rational justifications, a statute's retroactivity does not implicate due process concerns.

In enacting the Energy Policy Act, Congress rationally concluded that the cost of decontaminating and decommissioning the uranium enrichment plants that had supplied enrichment services to domestic utilities since the 1950s should be shared by all of the participants in the relevant market, including the government and those utilities that used the enriched uranium to produce electricity for their retail cus-

tomers. Pursuant to the Act, the government pays more than 68% of the total decontamination and decommissioning expense. 42 U.S.C. 2297g-1. Moreover, unlike the government's contribution under the Act, the utilities' contribution is subject to an annual cap, 42 U.S.C. 2297g-1(c), and an aggregate cap, 42 U.S.C. 2297g-1(e). That approach was supported by representatives of the domestic nuclear utility industry, including an association of which petitioner was a member. See page 2, *supra*.

Petitioner presents this Court with no principle that overcomes the Energy Policy Act's presumption of constitutionality or justifies any second-guessing of Congress's policy judgment. The fact that the DOE once used fixed-price contracts to sell enrichment services to petitioner simply has no bearing on the issue of whether Congress had a rational basis for deciding to spread the cost of the decontamination and decommissioning among the participants in the transactions that necessitated those expenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-801

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the federal government, having entered into fixed-price contracts to sell certain services, may subsequently enact legislation that imposes additional costs—incurred by the government in providing those services—predominantly on the purchasers under the previous fixed-price contracts.

2. May Congress impose retroactive financial liability on companies based solely on the fact that they purchased government services as much as thirty years ago?

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.2 of this Court, Washington Legal Foundation respectfully submits this brief *amicus curiae* in support of petitioner.[1] Consent to the filing of this brief has been granted by counsel for all parties, and letters have been lodged with the Clerk.

Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C. WLF devotes substantial resources to promoting private property rights and due process for businesses by publishing on these subjects through WLF's Legal Studies Division and by participating in related litigation. For example, WLF has appeared as *amicus curiae* in a number of cases challenging the constitutionality of legislation under the Due Process and Takings Clauses of the Fifth Amendment. *See, e.g., United States v. Carlton*, 512 U.S. 26 (1994); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Relatedly, WLF is concerned that the federal government not be permitted to retroactively impose costs on its contracting partners. Such conduct not only exposes government contractors to unfair and unpredictable expenses, but also impairs the government's reliability as a contracting partner.

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[1] Pursuant to SUP. CT. R. 37.6, counsel for Washington Legal Foundation state that they have authored this brief in whole, and that no person or entity other than Washington Legal Foundation, its members, and counsel, have made a monetary contribution to the preparation or submission of the brief.

WLF believes that its perspective will complement the brief of the petitioner and be of material assistance to the Court in deciding the issues in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a famous passage from *De Oratore*, Cicero likens the construction of a legal argument to the building of a house. The process can proceed well or poorly—and the result will be a temple or a hovel—depending on the integrity of successive steps and adherence to formal rules of structure. Moreover, bad arguments with the outward appearance of stability, like a house with a ramshackle infrastructure, wobble and fall all the same.

Like Cicero's examples of ill-fated arguments, the Federal Circuit's rationale for applying the "sovereign acts" doctrine to uphold the legislation challenged in this case, cannot withstand scrutiny. From the first brick in the edifice, the court's analysis goes awry. Structurally, the court's argument that Congress, in enacting the Energy Policy Act, effected a "public and general" purpose, rests on a textbook fallacy of logic. Further analytical problems—related mainly to confusion over notions such as ascertaining the "purpose" of the legislation and the meaning and import of "public and general"—irreparably sabotage the court's holding.

Substantively, the Federal Circuit's argument fares no better. The two propositions offered as the keystones of the rationale—(i) that the Act singles out, not previous contractors, but beneficiaries of the DOE's services; and (ii) that not all, and not only, previous

contractors are assessed—are not sufficient grounds, either independently or together, to conclude that the challenged government action is "public and general."

The analytical problems in the Federal Circuit's decision flow from its misunderstanding of *United States v. Winstar*. There this Court reaffirmed the *general rule* that government is bound by the rules of contract when it acts in its capacity as a contractor. Although any substantive explication of the *Winstar* approach to the sovereign acts doctrine is oddly absent from the Federal Circuit's analysis, that court—purportedly guided by *Winstar*—effectively expands the sovereign acts doctrine into an exception that swallows the general rule. In the process, the court excuses the challenged action even though the assessment caused by the Act falls substantially on the government's contracting partners.

As petitioner persuasively demonstrates (Pet.7-16), the decision of the Federal Circuit cannot be squared with *Winstar* and establishes a dangerous precedent in a court that is the principal forum for government contracts litigation. Grant of the petition will provide the Court with the opportunity to clarify several doctrinal points the Federal Circuit grossly misconstrues. Beyond this jurisprudential reason for review, the case arises in an area of law where huge financial repercussions for American business hang in the balance. It is thus a manifestly important case for the Court to address. For these reasons, the petition should be granted.

ARGUMENT

I. PARAMETERS OF THE SOVEREIGN ACTS ANALYSIS

1. *Background.* The federal government generally is bound by contractual obligations similar to those of private parties. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also United States v. Smith*, 94 U.S. 214, 218 (1976) (if between private parties the conduct "would be considered an improper interference, and damages would be awarded to the extent of the loss . . . . [t]he United States must answer according to the same rule"); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); *Perry v. United States*, 294 U.S. 330, 352 (1935).

The "sovereign acts" doctrine is an exception to this general rule. It provides that the government as a contractor is not liable for the breach of contract damages resulting from its "public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). By creating an exception from contractual liability where the government acts "as sovereign," the doctrine allows for legislation that affects the public interest without subjecting the government to liability for incidental effects its actions may have on a range of contracts with private parties. However, the doctrine expressly recognizes that the

government lacks the power to abrogate its contractual obligations to private parties with impunity, because it affords immunity only when an act is "public and general."

2. *Winstar Principles.* The Court's most recent discussion of the sovereign acts doctrine came in *United States v. Winstar*, 116 S.Ct. 2432 (1996). The *Winstar* litigation grew out of the savings and loan crises of the 1980s, and measures to solve the problems legislatively in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The plaintiffs claimed that, by enacting FIRREA, Congress breached the terms of agreements between federal agencies and themselves. The agencies had made the agreements to induce the plaintiffs and others to merge with insolvent thrift institutions.

In *Winstar*, a plurality decision authored by Justice Souter, the Court found that FIRREA did not qualify for the sovereign acts defense because the statute was not "public and general." The analysis began by reiterating that, when government acts in its capacity as contractor, rather than as sovereign, it is subject to the same rules that bind private contractors. *Id.* at 2465. The principal opinion rejected the government's argument that the sovereign/contractor distinction should turn on whether a law is "enacted to govern regulatory policy or to advance the general welfare," *id.* at 2464, because it is too difficult to distinguish when the government is acting in its regulatory versus nonregulatory capacity. *Ibid.*

Instead, the Court fashioned an approach that considers the relative degree of "self-interest" in a governmental action: "[S]ome line has to be drawn in situations like the one before us between regulatory legislation that is relatively free of governmental self-interest and therefore cognizable for the purpose of a legal impossibility defense and, on the other hand, statutes tainted by a governmental object of self-relief." *Id.* at 2465. By self-interest, "[W]e simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *Ibid.*

This emphasis on assessing the extent of governmental self-interest allows the government to escape contractual consequences of its action *only* where "the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective." *Id.* at 2466. This approach steers a middle course, said the plurality, between (1) the dissent's position that "[t]he United States as a contractor [is] not responsible for the United States as a law giver," and (2) the position that "any benefit at all to the Government" would render an act insufficiently public or general. *Id.* at 2467.

To apply this standard, the plurality articulated the following test: A governmental act is not "public and general" where it "has the substantial effect of releasing the Government from its contractual obligations." *Ibid; see also id. at 2466* (a key factor is whether "a substantial part of the Government's action . . . falls on its own contractual obligations"). Applying this test to FIRREA, the Court observed that the statute

"had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised." *Ibid.* The opinion made clear that its analysis looked beyond whether FIRREA was "formally general." *Id.* at 2468. It rejected the government's argument that FIRREA was public and general because FIRREA had a clear public purpose to realign the thrift industry. That argument, said the Court, proves too much:

> We assume nothing less of all Congressional action, with the result that an intent to benefit the public can no more serve as a criterion of a "public" and "general" sovereign act than its regulatory character can. While . . . Congress acted to protect the public in the FIRREA legislation, the extent to which this reform relieved the Government of its own contractual obligations precludes a finding that the statute is a "public and general" act for purposes of the sovereign acts defense.

Id. at 2468-69.

The Court found ample evidence that Congress was aware of the adverse effect FIRREA's provisions would have on government contracts with the plaintiff institutions. *Id.* at 2467-69. This congressional concern with the impact of FIRREA "suffice[d] to demonstrate that FIRREA had the "substantial effect of releasing the Government from its own contractual obligations." *Id.* at 2468.

The Court dismissed the notion that it had constructed a "legislative intent" test. Rather, legislative intent in this case was evidence of the

statute's "substantial effect." *Id.* at 2468 n. 50. The Court further distanced itself from an intent test by positing as an alternative—but rejecting as too difficult to apply—an inquiry that examines whether "the predominant purpose or effect [of a government act] was avoidance of the Government's contractual commitments." *Id.* at 2467 n. 46.

* * *

As demonstrated below, severe analytical problems wholly undermine the Federal Circuit's decision. These infirmities flow from the lower court's apparent misunderstanding of *Winstar*'s formulation of the sovereign acts doctrine. The result is that, if the Federal Circuit's analysis were accepted, it would expand the sovereign acts doctrine into an exception that swallows the general rule.

II. THE FEDERAL CIRCUIT'S OPINION RESTS ON SEVERE ANALYTICAL MISTAKES

The Federal Circuit in its opinion below constructed its argument in two parts. The first part purports to frame the test for determining whether the Government has acted as contractor or sovereign. The second part is the substantive argument itself. Both of these basic steps are analytically defective.

1(a). *Framing the Test.* The Federal Circuit described the sovereign acts doctrine as a "case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts." App. 9a. Accordingly, the court viewed its task as

deciding "whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public)." *Ibid.*

1(b). *Two Analytical Mistakes.* The lower court's formulation commits at least two logical errors. The first is a straightforward instance of the fallacy of false dichotomy. The court's approach depends on the view that no logical intersection exists between the two categories—that *either* (i) the Act had the "purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic," *or* (ii) the Act had the "purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities." But that is a false distinction. Alternatives (i) and (ii) are not mutually incompatible. Specifically, even if we assume *arguendo* that alternative (ii) is true—that a purpose of the Act was to address the decontamination and decommissioning problem—that is not a valid reason for concluding that petitioner's claim is not meritorious. In other words, alternative (ii) is not sufficient to establish that the Act is "public and general." The court is, wittingly or unwittingly, trying to create a rhetorical contrast in order to reject (i) and accept (ii). In framing the test this way, the Federal Circuit achieves precisely what the fallacy of false dichotomy beguilingly offers: An unfair

characterization of the dispute that erroneously prejudices the outcome of the argument.

There is a second problem with the Federal Circuit's statement of the test. The court wishes to demonstrate that the sovereign acts defense is applicable because the Government's acting to solve the problem of decontamination and decommissioning means "the legislation was passed for the benefit of the public," *ibid.*, and is accordingly "public and general." But nothing in the second alternative implies this. That the government was acting to solve the problem of decontamination and decommissioning of uranium enrichment facilities does not, at least in any meaningful sense, imply that the activity meets the "public and general" criterion. If the Federal Circuit's logic were sound, virtually all acts of the government-as-contractor could be defended as "sovereign acts," because nearly all legislation has a public and general dimension. Reasoning from the specific subject matter of the legislation to generalize that the legislation is therefore public and general, is logically invalid.

Moreover, evidence that the legislation in question is passed "for the benefit of the public," *ibid.*, is similarly insufficient to show that the activity is "public and general." The legislative purpose or intent to act for the public good does not necessarily yield legislation that is "public and general." For example, in *Lynch v. United States*, 292 U.S. 571 (1934), the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the required monthly premiums. Congress subsequently enacted the Economy Act, which repealed "[a]ll laws granting or

pertaining to yearly renewable term insurance." *Id.* at 575. This Court held the legislation unlawful. This is an example of a case where Congress plainly had acted with a purpose or intent to benefit the general weal at a time of "great need of economy," *id.* at 580, yet the specific effect that the legislation had on the plaintiffs rendered the legislation unlawful. *See also, Winstar, supra.* Thus, a finding that Congress intended to act for the benefit of the public does not establish *eo ipso* that abrogation of the contract terms is excusable because the government had acted as sovereign.

1(c). *Sources of the Confusion.* The cause of the Federal Circuit's analytical confusion is, at least in part, its belief that the sovereign acts analysis is meant to "determine whether the Act is designed with the *purpose* of affecting or altering the Government's prior contracts." App. 9a-10a (emphasis added). As petitioner correctly points out, this approach "wrongly transforms the sovereign acts defense into a purpose-based inquiry." Pet. 10. Predicating the analysis wholly on the underlying purpose of the legislation is problematic because "purpose" in this context is an inherently fuzzy concept. Legislation typically has multiple "purposes" that are not necessarily incompatible. The danger is that a court either imposes a false dichotomy as to the statute's purposes, in which case (as here) the analysis is skewed from the start; or the court recognizes more than one purpose, but lacks a principled basis for going any further. That is why it is critical that the linchpin of the analysis be the *effect* of the legislation on the government's

contracting partners. *Winstar* makes this clear, but the Federal Circuit misconceived that essential point.

2(a). *The Argument Itself.* The Federal Circuit's substantive argument is likewise invalid. The argument is structured as follows:

> (1) The Act requires contribution to the fund from any utility that purchased separative work units from the DOE before the Act's passage;
>
> (2) The Act does not require the contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility;
>
> (3) The Act does require contribution from any utility that did not have a contract with the DOE but nonetheless benefitted from the DOE's services by purchasing through the secondary market;
>
> (4) Therefore, the scope of the Act is not coincident with those utilities that had previously entered into contracts with the DOE for uranium enrichment services.
>
> (5) Because some utility contracts are not embraced by the Act, while some purchases from private entities are covered, Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements.
>
> (6) Rather, the Act targets whichever utilities benefitted from the DOE's enrichment services.

> (7) Therefore, the Act has a public and general purpose, and the sovereign acts defense applies.

App. 10a.

2(b). *Further Analytical Mistakes*. In this argument the Federal Circuit concludes that the statute is a suitable exercise of governmental sovereignty because (i) the language of the Act singles out, not previous contractors but beneficiaries of the DOE's services; and (ii) not all—and not only—previous contractors are assessed.

This argument is unsound. Neither reason is sufficient in itself to establish that the governmental action is "public and general."

i. *That the Act singles out beneficiaries of DOE's services*. As for the significance of this claim, this Court reiterated in *Winstar* that the mere fact that legislation is written in a formally general way is an insufficient predicate for concluding that its purpose is "public and general" so as to excuse the abrogation as a sovereign act. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially on the Government's contracting partners." *Winstar*, 116 S.Ct. at 2468.

This point can be illustrated in a further way. In the instant case, it is undisputed that 85 percent of the special assessment falls on utilities that had procured enrichment services contractually from the

government. As discussed in more detail below, the lower court reasons that, because "the scope of the Act is not *coincident* with" those utilities that had contracted with the government previously, but rather covers any "ultimate beneficiary of the DOE's services," App. 10a (emphasis added), Congress therefore acted with a "public and general" purpose.

This conclusion does not follow. To see this, suppose hypothetically that there were a perfect coincidence of the two categories, contractors and beneficiaries (*i.e.*, contractors and beneficiaries were one and the same; there was no secondary market); and that, as here, the statute addressed "beneficiaries" of DOE's services. In that case, the statute, though worded to encompass both contractors and beneficiaries, would have impacted *precisely those* who had been affected by the assessment (though under the label of "beneficiaries"). The two groups—contractors and beneficiaries—would still be the operative categories, just as they are in the Federal Circuit's analysis. But clearly it would not follow that the Act would therefore have a "public and general" purpose, because *only* previous contractors would be affected. Under *Lynch*, the legislation would unquestionably be deemed unlawful, even though the Federal Circuit's formula would be applied.

ii. *That not all, and not only, previous contractors are assessed.* This claim likewise does not advance the issue. Imagine a hypothetical case that satisfies this criterion. Suppose the statute in question assessed all previous contractors of DOE's services except those who entered a contract in say, 1969, and also assessed

those utilities who contacted the DOE in 1969 about the possibility of entering a contract, but never, in fact, did so. Such legislation obviously would be ruled unlawful, even though it had been drafted in such a way as to single out not all, and not only, previous government contractors. In other words, claim (ii)—advanced by the Federal Circuit as a valid criterion of analysis—would be satisfied, yet the legislation would be impermissible. The statute would assess not all, and not only, contractors of DOE services, but would fail any rational test for qualifying as a "public and general" activity of the government.

Indeed, that there is a secondary market at all, or that 15 percent of the assessment is allocable to that group, is an empirical variable. The figure might have been 1 or 30 or 70 percent. Thus, the Federal Circuit's reliance on "beneficiaries" as the operative category of its test does not perform any genuine analytical work. It cannot be used to determine whether the Act is "public and general." That analysis can only be a function of the *effect* of the legislation.

Accordingly, neither reason (i) or (ii) constitutes a sufficient ground for the conclusion reached. Moreover, the lower court's argument gives no indication of how to combine the reasons to yield an adequate argument. The argument therefore fails.[2]

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[2] By contrast, the dissenting opinion of Judge Mayer in the proceeding below properly characterized *Winstar*'s formulation of the sovereign acts doctrine. The dissent reasoned that the fact that "the assessment is levied on some utilities that did not contract directly with the Government, is not determinative." App. 28a. Citing the "substantial effects" standard from *Winstar*, and observing

2(c). *Sources of the Confusion*. As before, the Federal Circuit's confusion could have been avoided if the court had focused on the legislation's *effect* as a function of the government's self-interest, as *Winstar* prescribes. Instead, by imposing a false distinction as to the statute's purposes, the court traps itself into thinking that the statute must be "public and general" merely because it includes "beneficiaries" of the DOE's services.

* * *

The decision of the Federal Circuit cannot be squared with *Winstar*. The weakness of the lower court's argument indicates it has grossly misunderstood the principles this Court ennunciated in that case. If left uncorrected, the Federal Circuit's decision establishes a dangerous precedent that effectively tranforms the sovereign acts doctrine from a limited exception in the government's contracting arrangements, into a generally available *deux ex machina* the government may invoke whenever it wishes to escape the consequences of past contractual obligations.

Grant of the petition will provide the Court with the opportunity to forefend that development by clarifying, if necessary, the fundamental approach the Court articulated in *Winstar*. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) ("Because the case

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that "85% of the special assessment fell on utilities that had procured enrichment services directly from the Government," Judge Mayer concluded that "the assessment's impact falls substantially on the Government's contracting partners" and the statute cannot therefore be a "public and general" act for purposes of the sovereign acts defense. *Id.* at 29a.

presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted *certiorari*); *Arizona v. Mauro*, 481 U.S. 520, 525 (1987) (review granted "[b]ecause the decision below appeared to misconstrue our decision in *Rhode Island v. Innis*"). Moreover, because this case arises in an area of law where enormous financial repercussions for business result from the decisions of the Federal Circuit, the prospect of that court's operating under a precedent that misconstrues *Winstar* is one that must be foreclosed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN SUPPORT OF PETITIONER FILED BY THIRTY-ONE ELECTRIC UTILITIES AS *AMICI CURIAE*

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IN THE

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YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN SUPPORT OF PETITIONER FILED BY THIRTY-ONE ELECTRIC UTILITIES AS *AMICI CURIAE*[1]

This case concerns the power of the federal government, having entered into written contracts to perform services at a fixed price, to impose substantial additional charges on the purchasers of those services many years after the contracts were fully performed.

For over 30 years, the federal government provided uranium enrichment services to electric utilities for fuel used in nuclear power plants. Those services were furnished under fixed-price contracts with each

[1] No counsel for any party in this case authored this brief, either in whole or in part. No person or entity other than the *amici* listed in footnote 2 has made a monetary contribution to the preparation or submission of this brief. Consent to file this brief has been obtained from the parties, as reflected in correspondence filed with the Clerk of the Court.

utility. Much later, Congress enacted the Energy Policy Act of 1992 ("EPACT") which, *inter alia*, provided for the eventual privatization of the federal government's uranium enrichment enterprise. In order to avoid saddling the new entity with the costs of decontamination and decommissioning ("D&D") of the enrichment facilities, Congress imposed a special assessment on domestic utilities based on the amount of enrichment services each utility previously acquired from the government. The total assessment imposed on utilities is in excess of $2.25 billion.

In upholding the special assessment, the court of appeals majority fundamentally misapplied the principles of this Court's decision in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996). Disregarding *Winstar*, the court of appeals approved a severely retrospective assessment that has the effect of releasing the government from explicit fixed-price terms of contracts under which it sold uranium enrichment services. The contracts on which this assessment is now levied, in fact, date back more than 30 years. The court of appeals decision thus has far-reaching implications. It creates great uncertainty as to whether the federal government is ever bound by the payment terms of its contracts with private parties and will certainly erode the public's confidence in the government as a reliable contracting partner. While the court of appeals majority justified its result by treating the special assessment as a general tax, this conclusion conflicts with the Court's precedent. Even assuming *arguendo* that the assessment is properly characterized as a tax, the extreme retroactivity of the assessment makes it constitutionally infirm. For these reasons, *amici* support the petitioner in seeking review by this Court.

INTERESTS OF *AMICI CURIAE*

The *amici* are 31 electric utility companies[2] that, like the petitioner Yankee Atomic Electric Company ("Yankee Atomic"), have rights under government contracts abrogated by the special assessment imposed under EPACT. All *amici* purchased uranium enrichment services from the federal government under contracts with pricing provisions identical or similar to those in the Yankee Atomic contracts.

Most of the *amici*, as well as other utilities, have filed claims in the Court of Federal Claims seeking relief from the assessment on the grounds that it represents a breach of contract and a taking of vested property rights.[3] All the cases below have been

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[2] The *amici* consist of the following companies: Arizona Public Service Company; The Cincinnati Gas & Electric Company; Commonwealth Edison Company; The Detroit Edison Company; Duke Energy Corporation; Duquesne Light Company; Entergy Operations, Inc.; Florida Power Corporation; Florida Power & Light Company; GPU Nuclear, Inc.; IES Utilities, Inc.; Indiana Michigan Power Company; Kansas City Power & Light Company; Kansas Electric Power Cooperative, Inc.; Kansas Gas and Electric Company; Nebraska Public Power District; New York Power Authority; Niagara Mohawk Power Corporation; Omaha Public Power District; PECO Energy Company; PSI Energy, Inc.; Public Service Electric & Gas Company; Rochester Gas & Electric Corporation; Southern California Edison Company; Southern Nuclear Operating Company; Texas Utilities Electric Company; Union Electric Company; Virginia Electric & Power Company; Washington Public Power Supply System; Wisconsin Public Service Corporation and Wolf Creek Nuclear Operating Corporation.

[3] Docket Nos. 96-290C, 96-616C, 96-217C, 96-218C, 96-712C, 96-702C, 96-673C, 97-269C, 96-430C, 97-18C, 96-490C, 96-748C, 96-674C, 96-780C, 97-236C, 96-429C, 96-371C, 96-654C, 96-407C, 97-108C, 97-268C and 97-686C.

stayed pending the outcome of this case. Accordingly, *amici* have a substantial interest in this matter.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION HAS A MAJOR ECONOMIC IMPACT ON AFFECTED UTILITIES AND CREATES GREAT UNCERTAINTY FOR WHETHER THE FEDERAL GOVERNMENT IS BOUND BY ITS CONTRACTS

The importance of this case is evident not only in the huge sums to be collected under the special assessment and the economic impact of that liability, but also in the violence done to basic contract and constitutional principles.

1. The special assessment imposed under EPACT requires domestic utilities that acquired uranium enrichment services from the government to pay up to $150 million per year for 15 years, or until a total of not less than $2.25 billion has been collected. 42 U.S.C. § 2297g-1. This typically amounts to $1 million to $1.5 million each year for a single commercial nuclear power unit. For most utilities, the effect is to increase their *total* cost of all past uranium enrichment purchases from the federal government by 10 to 20 percent.

In response to this enormous new liability, virtually the entire nuclear power industry has sought relief in the Court of Federal Claims. *Amici* comprise the vast majority of nuclear utilities in this country, which, together with the petitioner as well as other affected utilities, are seeking relief from the D&D provisions of EPACT. Some 30 separate actions have been filed by *amici* and others, seeking refunds of past payments totaling over $400 million. The suits in the Court of Federal Claims are currently stayed pending the resolution of this case, which will establish the binding law of the Federal Circuit. A conflict

among the United States courts of appeals is not likely since these actions all arise in that Circuit. Granting certiorari is therefore timely and will enable the Court to settle the important questions of law governing the large number of cases pending below.

Not only are vast sums of money directly at stake, the special assessment could also undermine the competitive advantage of many nuclear generating facilities. Many states are moving toward deregulation of the electric utility industry. In a competitive market, a utility's ability to compete may be threatened—quite unfairly—by the government's retroactive increase in contract price. Where utilities still operate under traditional cost-of-service ratemaking, they may be able to recover the cost of the special assessment in rates, but that result is by no means assured. At least one state public service commission has already disallowed the pass-through of this liability.[4]

2. The court of appeals' decision undermines the sanctity of contracts with the federal government. Utilities purchased uranium enrichment services under standard fixed-price contracts offered by the government. Those contracts provided that the charges for a separative work unit ("SWU"), the standard measure of enrichment services, were based upon the published price "in effect at the time of performance" —defined as the date of delivery of the related enriched uranium to the customer. The contracts also provided that any increase in price required advance notice to the customer. None of the contracts provided any right to revise the prices for enrichment *after* receipt of the services.

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[4] *Wisconsin Public Service Corp.*, Docket No. 6690-UR-110. Findings of Fact, Conclusions of Law and Order, dated Feb. 25, 1997.

Thus the contracts embodied an explicit obligation by the government to supply services at a specified fixed price. By virtue of the performance of the contracts, utilities acquired vested property rights protected by the Fifth Amendment, and the federal government may not unilaterally alter or destroy the essential terms of those contracts. *Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934). As this Court ruled in *Perry*, the government is not free to repudiate the payment terms of its contracts. 294 U.S. at 350. Yet that is precisely the effect of the special assessment at issue here. The assessment exacts more funds for services already rendered and paid for. It thereby nullifies the fixed-price terms of the contracts. Where, as here, a statute has "the substantial effect of releasing the Government from its own contractual obligations," *Winstar*, 116 S. Ct. at 2468, the government remains liable for damages in its role as contractor.

The court of appeals' decision to the contrary has far-reaching implications. First of all, it renders the pricing provisions of the government's contracts wholly illusory, and essentially means that the government is never bound by a promise to sell goods or services at a set price. This result is a radical departure from this Court's decisions in *Perry* and *Winstar*. Moreover, the decision below, if allowed to stand, would establish a precedent for similar exactions in other contexts when the federal government decides it has paid too much or charged too little for goods or services bought or sold at arm's length. In addition to the manifest unfairness to the targeted companies, this case thus has serious implications for whether the federal government can be counted on by anyone as a reliable contracting part-

ner. The Court should therefore grant certiorari to resolve the serious issues raised.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WINSTAR* IN VIEW OF THE COMMERCIAL NATURE OF THE GOVERNMENTAL ACTION

The court of appeals majority based its decision on the sovereign acts and unmistakability doctrines. This was clearly in error. Under this Court's precedent in *Winstar*, the nature of the government's action, in releasing itself from its own contractual obligations for commercial reasons, precludes a finding that it is a "public and general" sovereign act.

1. In providing uranium enrichment services, the government at all times acted as a commercial business enterprise, supplying services pursuant to the terms of written contracts. In the formation of those contracts, the government had ample authority and opportunity to recover its full costs in the pricing of SWU. From the early days of the enrichment program, the federal government adhered to a "fundamental concept" in pricing SWU—namely, full recovery of the government's costs over a reasonable period of time.[5] Section 161v of the Atomic Energy Act was amended in 1970 to specify that the price "shall be on a basis of recovery of the Government's costs over a reasonable period of time. . . ." [6] Indeed, as discussed below, the federal government had a near monopoly on the world uranium enrichment market until the mid-1970s, and therefore had the discretion to set its prices in a manner to ensure full cost recovery. Thus, there can be no question that the Atomic Energy Commission and its successors, the Energy Research and Development Administration

[5] *See, e.g.*, H.R. Rep. No. 91-1470, 91st Cong. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4981, 5002.

[6] 42 US.C. § 2201v (1970).

and the Department of Energy,[7] had the authority and opportunity (indeed, were *required* by the Atomic Energy Act) to price enrichment services so as to recover all the government's costs, including costs which obviously would need to be borne eventually for the decontamination and decommissioning of the facilities.

2. The court of appeals majority characterized the "main purpose" of the special assessment as being "to spread the costs of a problem that [Congress] *realized only after the contracts had been performed.*" [8] Contrary to this pivotal assumption, the ultimate need to decontaminate and decommission the enrichment facilities was foreseen or reasonably foreseeable decades ago, and the government was in fact recovering estimated D&D costs in the SWU price before passage of EPACT in 1992.

The federal government was aware early on that there would be substantial D&D costs associated with nuclear facilities. Many nuclear facilities, including several operated by the federal government, had already been decommissioned between 1950 and 1970.[9]

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[7] The federal government's uranium enrichment enterprise was originally run by the Atomic Energy Commission ("AEC"). This function was transferred to the Energy Research and Development Administration ("ERDA") in 1974. In 1977, the Department of Energy ("DOE") assumed responsibility for the program. DOE maintained responsibility for the uranium enrichment enterprise until it was transferred to the newly created United States Enrichment Corporation under EPACT.

[8] *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1575-76 (Fed. Cir. 1997) (emphasis added).

[9] *See* NUREG-0586. "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities," published by the Nuclear Regulatory Comm'n (Aug. 1988), at

By 1970, the AEC—the very agency then responsible for the enrichment program—was focusing on the need to assure recovery of D&D costs for fuel reprocessing plants.[10] In 1977, the Comptroller General of the United States issued a report to the AEC's successors, ERDA and the Nuclear Regulatory Commission, highlighting the need to plan for the substantial D&D costs for nuclear facilities, including those operated by the federal government.[11]

In full knowledge that all nuclear facilities need to be decontaminated and decommissioned in due course, the federal government was required to and had ample statutory authority to incorporate D&D costs into the pricing of enrichment services. From the beginning, the federal government's pricing policies purported to cover "all" the government's cost, and therefore must be presumed to have included an allowance for D&D costs. For example, the AEC's 1973 pricing criteria stated that the charges covered, among other things, "electric power and *all other costs, direct and indirect, of operating the enrichment plants* . . . ." [12] Significantly, the price included a "margin for contingencies" which would have covered D&D and any other costs that could not be determined precisely.[13]

Tables 1.5-1 and 1.5-2 (citing 10 nuclear facilities decommissioned before 1970).

[10] *See Siting of Fuel Reprocessing Plants and Related Waste Management Facilities*, 35 Fed. Reg. 17,530 17,532 (1970).

[11] *Cleaning Up the Remains of Nuclear Facilities—A Multi-Billion Dollar Problem*, EMD-77-46, dated June 16, 1977.

[12] *Uranium Enrichment Services Criteria*, published by Atomic Energy Comm'n, dated Jan. 23, 1973, at 7.

[13] *See* H.R. Rep. No. 91-1470, *supra* note 5, at 5003 (quoting General Accounting Office review of AEC pricing criteria). DOE's revised pricing criteria published in 1986 similarly

In fact, in its fiscal year 1988 pricing, the government included an explicit allowance for projected D&D costs. As DOE informed Congress in 1990:

> DOE has recognized and recovered environmental costs and D&D in FY 1988, FY 1989, and FY 1990 through its enrichment prices and DOE will recover all future environmental and D&D costs through future enrichment prices.[14]

DOE further stated that "[b]eginning in FY 1991 SWU charges will also recover $50 million each year to cover the commercial [utility] share of future D&D activities for all three [uranium enrichment] sites." [15] Thus the court of appeals decision was based on the erroneous assumption that D&D costs were an after-discovered cost.

3. The government's pricing of uranium enrichment services was not impaired by the unforeseeability of the need to decontaminate and decommission. This ultimate need was obvious from the beginning. Further, later on, the government's pricing was driven quite clearly by the commercial desire to induce utilities to continue to purchase government-produced uranium enrichment. In marketing its uranium enrichment services, the government recognized that price was the "predominant factor that customers use in determining their source of enrich-

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represented that the SWU price was established based on "all" the government's costs of operating the facilities. Final Rule, *Uranium Enrichment Services Criteria*, 51 Fed. Reg. 27132 (1986) (codified at 10 C.F.R. § 762.5 (1986)).

[14] *Dep't of Energy's Uranium Enrichment Program: Hearing before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 101st Cong. 133 (May 1, 1990).

[15] *Id.* at 139.

ment supply." [16] While the federal government had a near monopoly on the world uranium enrichment market in the early years of the program, by the mid-1970s, foreign competition emerged for supplying enrichment services. With competition, customers had the option to seek enrichment services from suppliers other than the federal government. Some utilities began to cancel commitments to DOE (in accordance with contract termination provisions) in order to purchase SWU from lower-cost sources.[17] As a result, the federal government's share of the uranium enrichment market declined to below 50 percent by the early 1980s.[18]

In an effort to preserve market share, the government offered incentives to induce utilities to remain long-term customers. In January 1984, DOE introduced a new form of uranium enrichment contract, the "Utility Services Contract"—which included lower prices and more flexible terms than earlier contracts.[19] The Utility Services Contract stated that

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[16] *Id.* at 135.

[17] H.R. Rep. No. 102-474, Part 2, 102d Cong. (1992), *reprinted in* 1992 U.S.C.C.A.N. 2064.

[18] For background, *see* Final Rule, *Uranium Enrichment Services Criteria, supra* note 13.

[19] The Utility Services Contract is not involved in the present case, but will be in many of the pending cases in the Court of Federal Claims brought by other utilities. Approximately 90 percent of DOE's customers converted to these contracts. The contract term was 30 years, with an established 10-year ceiling price, adjusted annually for inflation. Customers were allowed to purchase up to 30 percent of their annual SWU requirements from non-DOE sources. In exchange for utilities converting to this form of contract, DOE entered into Supplemental Agreements of Settlement which acknowledged that the utilities had fulfilled their obligations under the prior contracts.

> DOE intends to serve as a reliable long term supplier of uranium enrichment services at predictable prices while providing the most competitive prices possible through technological innovation; and . . . DOE desires to operate the enrichment complex on a sound business basis without Government subsidy . . . .

Once it had established a customer base with the new contracts, the government began marketing initiatives to expand sales. In 1985 and 1986, DOE offered "incentive prices" substantially below the standard SWU price in order to attract additional purchases from customers.[20] The pricing terms of the contracts were thus a clear inducement to utilities to purchase services from the government.

4. In 1992, as part of EPACT, Congress comprehensively restructured the government's uranium enrichment business, created the United States Enrichment Corporation ("USEC") and provided for the eventual privatization of the enrichment program in USEC. 42 U.S.C. § 2297d. The new government corporation (as lessee of the enrichment plants) was relieved of any preexisting D&D liability (prior to July 1, 1993). EPACT specified that D&D costs "shall remain the sole responsibility of [DOE]," 42 U.S.C. § 2297c-2, but imposed the special assessment on domestic utilities to fund DOE's obligation.

The legislative history reveals that Congress was concerned that the government's restructured uranium enrichment business would not be able to operate competitively and profitably if it retained responsibility for D&D costs:

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[20] *See Uranium Enrichment: Congressional Action Needed to Revitalize the Program*, General Accounting Office, dated Oct. 1987, at 42.

> A Government corporation, with a clearly defined mission to operate as a commercial enterprise on a profitable and efficient basis, will provide the enrichment program with the businesslike structure and flexibility that is crucial to the survival of the program. In addition, *any legislation for revitalizing the enrichment enterprise should also address other issues which affect the program, such as the decontamination and decommissioning of the enrichment plants.*[21]

Congress was obviously concerned about the new corporation's ability to maintain competitive prices and attract private investors. Thus the special assessment shifted the D&D obligation from the government, where it belonged, to the government's contract partners in order to enhance the value of the new entity to the government and enable USEC to be competitive in the open market. The effect of this action was to repudiate, for commercial reasons, the fixed price terms of the contracts and deprive utilities of their vested contract rights. Under the principles of *Winstar*, such a result precludes a finding that the special assessment is a "public and general" sovereign act. 116 S. Ct. at 2469.

III. THE COURT OF APPEALS' CHARACTERIZATION OF THE SPECIAL ASSESSMENT AS A "GENERAL TAX" CONFLICTS WITH PRECEDENT OF THIS COURT

1. The court of appeals stated in the majority decision that the characterization of the special assessment as either a retroactive price increase or an exercise of the sovereign's taxing power was the dispositive issue of the appeal. 112 F.3d at 1573. In characterizing it as a "general tax," 112 F.3d at

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[21] H.R. Rep. No. 102-474, Part 2, *supra* note 17, at 2084 (emphasis added).

1576, the court of appeals ignored long standing precedent of the Supreme Court. A tax is generally "an extraction for the support of a government" or "the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs." *United States v. Butler*, 297 U.S. 1, 61 (1936) and *Bank of Mount Hope v. Commissioner*, 25 B.T.A. 542, 543 (1932) (citing *Florida Central & Peninsula Railroad Co. v. Reynolds*, 183 U.S. 471, 475 (1902)). Customarily taxes are broadly applied on an involuntary basis to all persons falling within a definite class or area.[22]

In a related context, the Internal Revenue Service has ruled that a tax is an enforced contribution imposed and collected for the purpose of raising revenues to be used for public or governmental purposes and not for some special privilege granted or service rendered.[23] Ordinarily when amounts are paid into a specific fund or earmarked for a specific purpose, they are treated as imposed as a charge for a privilege or service rendered and not as a tax.[24]

The special assessment prominently displays the characteristics which the Supreme Court (and the Internal Revenue Service) repeatedly have held do *not* constitute a tax. First, the fee is imposed on an exceedingly narrow base—those who puchased enrichment services and only to the extent of their pur-

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[22] *Houck v. Little River Drainage District*, 239 U.S. 254, 264-265 (1915).

[23] *See, e.g.*, Rev. Rul. 86-140, 1986-2 C.B. 195; Rev. Rul. 81-193, 1981-2 C.B. 52; Rev. Rul. 79-180, 1979-1 C.B. 95; Rev. Rul. 77-29, 1977-1 C.B. 44; Rev. Rul. 71-49, 1971-1 C.B. 103; Rev. Rul. 61-152, 1961-2 C.B. 42.

[24] Rev. Rul. 77-29, *supra*, and Rev. Rul. 71-49, *supra*.

chases. Second, the fee is paid into a special fund in order to defray part of the cost incurred by the government in providing the services.

2. The majority's characterization of the special assessment as an exercise of the government's taxing power turned on the fact that the assessment was imposed not just on utilities which had contracts with the government but also on those who purchased SWUs from the government's contracting partners. 112 F.3d at 1575. The government concedes that at most 15 percent of SWUs were purchased on this secondary market. The petitioner submits that those secondary market purchasers are utilities that also had direct purchase contracts with the government.

The incidental imposition of the fee on third party purchasers of SWUs does *not* make the assessment a tax. The direct linkage between the users of DOE's enrichment services and the special assessment instead supports the conclusion that it is a supplemental payment for enrichment services. As this Court noted in *Winstar*, Congress may not disguise the targeting of government contractors by also assessing some insignificant number of transactions that were not under direct government contracts. 116 S. Ct. at 2468 ("Legislation can almost always be written in a formally general way, and the want of an identified target is not much security *when a measure's impact nonetheless falls substantially upon the Government's contracting partners*.") (emphasis added).

The overwhelming majority, if not all, of the affected third-party purchasers also had directly contracted with the government for the bulk of their enrichment services. In practice, the government's contracting partners bought and sold SWUs among themselves as their immediate need for enrichment

services varied from their contractual ability to secure enriched uranium from the government. The pool of SWU users did not expand significantly beyond the contracting partners by virtue of these secondary purchases.

The scant legislative history on this aspect of EPACT reveals no Congressional intent to impose a broad-based tax. The provisions in the law subjecting third-party purchasers to the assessment were not part of the original bill and were only included in the legislation when the House Committee bills were consolidated and sent to conference. The House bills that first included the special assessment simply stated that the assessment was to be collected from utilities in proportion to the amount of enrichment services they had purchased.[25] In applying the assessment to third-party purchasers, Congress was apparently attempting to prevent the obvious and additional unfairness of assessing a utility that had purchased certain SWUs from the government but never used them.

The impact of the D&D assessment falls overwhelmingly, if not exclusively, on the government's contracting partners. Therefore, the Federal Circuit's reliance on the inclusion of third-party purchases conflicts with *Winstar* and should be reviewed by the Supreme Court. Further, the court of appeals' characterization of the special assessment as an exercise of the sovereign's taxing power is erroneous under *Butler* and *Florida Central* and should be reviewed by the Supreme Court.

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[25] *See* H.R. Rep. No. 102-474, Part 1, 102nd Cong. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954; H.R. Rep. No. 102-474, Part 2, *supra* note 17.

IV. THE SPECIAL ASSESSMENT IS CONSTITUTIONALLY IMPERMISSIBLE DUE TO ITS EXTREME RETROACTIVITY

Even if one were to accept *arguendo* the court of appeals' characterization of the special assessment as a tax, serious constitutional questions are raised concerning retroactivity. The assessment is levied on transactions that occurred beginning in the 1950s. Permissible retroactivity of taxes has generally been "confined to short and limited periods required by the practicalities of producing national legislation." *United States v. Darusmont*, 449 U.S. 292, 296 (1981); *United States v. Hudson*, 299 U.S. 498, 500 (1937).

A tax on transactions dating back over 30 years is unprecedented and would go well beyond anything this Court has countenanced. *See, e.g., Nichols v. Coolidge*, 274 U.S. 531 (1927) (striking down 12-year period of retroactivity); *United States v. Carlton*, 512 U.S. 26, 38 (1994) ("[A] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions.") (O'Conner, J., concurring). Review by this Court is therefore warranted to ensure that the constitutional protections against retroactive taxation are not eroded.

In this connection, the Court has recently granted review in a case concerning the constitutionality of legislation that imposes retroactive liability. *Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42). Given the extreme period of retroactivity involved here and the government's readjustment of its own contractual obligations, review is also appropriate in the present case. In the alternative, *amici* support

the petitioner's request that the Court defer ruling on the petition pending its decision in *Eastern Enterprises*.

CONCLUSION

This case has enormous importance because of the precedential effect the decision by the Court of Appeals for the Federal Circuit will have on the utility industry and the government contracts community generally. The court of appeals' decision is inconsistent with the legal principles clearly enunciated by the Supreme Court in *Winstar*. For these reasons, *amici* respectfully request that the Supreme Court grant certiorari.

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No. 97-801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Committee on Energy (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.[1]

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[1] Written consents to the filing of this brief *amicus curiae* were provided by the parties and submitted to the Court in conjunction with this filing. No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a

The Committee is one of the standing committees of the Association, a voluntary bar association with almost 21,000 members. Since its inception, the Committee, established to report on all matters relating to energy, has actively participated in the consideration, development and interpretation of much of the legislation and regulation pertaining to the field of energy. The May 6, 1997 decision of the Federal Circuit involves a determination whether the more than $2 billion in special assessments imposed on the nuclear power industry by the Energy Policy Act of 1992 due to past utilization of uranium enrichment services constitutes an impermissible interference with vested utility rights under executed fixed-price contracts for enrichment services previously provided by the federal government.

SUMMARY OF ARGUMENT

The Association respectfully submits that the granting of a petition for a writ of certiorari is warranted both because of the exceptional importance of this case and because of the inconsistency between the Federal Circuit's decision and this Court's decision during the 1995-96 Term in *U.S. v. Winstar Corporation*. The Federal Circuit's decision presents a case of substantial public importance, in that it determines in a direct and substantial way the basic manner and extent to which the domestic nuclear power industry can rely upon the sanctity, reliability and enforceability of past and future commercial contracts with the government. Under such contracts the government has and will continue to provide es-

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monetary contribution to the preparation or submission of the brief.

sential services to an important segment of the nation's supply of electric energy. The decision is also irreconcilable with this Court's decision in *U.S. v. Winstar Corporation*, with the result that if the Federal Circuit's *Yankee Atomic* decision does not receive review the interpretation of the law regarding the obligations of the government as a contractor in commercial settings and the applications of the so-called sovereign acts and unmistakability doctrines in such contexts will be subject to confusion and inconsistency.

ARGUMENT

I. A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN *YANKEE ATOMIC ELECTRIC COMPANY v. THE UNITED STATES* SHOULD BE GRANTED BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF THE QUESTIONS PRESENTED

The decontamination and decommissioning ("D&D") special assessment created by the Energy Policy Act of 1992 (the "Act"), 42 U.S.C. § 2297g et seq., requires that $150 million be collected anually for a period of fifteen years exclusively from certain domestic nuclear utilities that had previously utilized the government's uranium enrichment services. At the end of the fifteen year collection period specified in the Act, the aggregate utility collections will have reached more than $2.25 billion.

The quite substantial amounts necessary to satisfy D&D assessments on a going-forward basis could threaten the viability of electric generating facilities in some circumstances, possibly requiring the premature closure of certain nuclear power plants where competitive market conditions no longer permit the

pass-through in rates of D&D assessment revenues called for by the Act.[2] Such closures would limit the energy mix available nationally, with potential concomitant impact on system reliability.

The D&D assessments here at issue are particularly inappropriate as a tax on the revenues of nuclear power plant owners because the circumstances giving rise to the obligation to pay the assessments relate solely to past utilization of DOE uranium enrichment services that in some instances reach back more than thirty years to the 1960s. Only past purchases of the government's uranium enrichment services are subject to the assessment, and only then in direct proportion to the amount of enrichment services purchased. These very same uranium enrichment services which now trigger an obligation to pay assessments were purchased by the owners of domestic power plants under fixed-price contracts.

Because of the direct, immediate and substantial effects continuation of D&D assessments will have on the nation's fleet of more than 100 nuclear power plants, this case is of substantial importance warranting review by this Court. Moreover, there are other contexts in which the nuclear industry has in good faith entered into commercial contracts with the United States that could be substantially affected by the *Yankee Atomic* outcome, including high level nu-

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[2] The Act purports to assure a funding stream for the $2.25 billion in revenues sought to be raised from nuclear utilities by providing that assessment monies are recoverable in electric rates set by state rate regulatory agencies, 42 U.S.C. 2297g-1(g). Such assurances are meaningless, however, in states which depart from traditional utility ratemaking practices and require that the pricing of electrical generation be set in the marketplace under competitive conditions.

clear waste (spent fuel disposal) and post-June 30, 1993 uranium enrichment services.

II. A REVIEW OF THE FEDERAL CIRCUIT'S DECISION IS NECESSARY TO SECURE CONFORMITY WITH THE DECISION OF THIS COURT IN *UNITED STATES v. WINSTAR*

The Federal Circuit's decision is irreconcilable with the principles articulated in this Court's decision in *U.S. v. Winstar Corporation*, 518 U.S. ——, 135 L.Ed.2d 964, 116 S. Ct. 2432 (1996), as they pertain to another important domestic industry that is also engaged in extensive contractual relationships with the United States in which the government is acting in a commercial capacity. The government functions as an important provider of insurance and accounting oversight services to the savings and loan industry (*Winstar*), while functioning as an important provider of ancillary support services, including spent fuel disposal and uranium enrichment, to the nuclear power industry (*Yankee Atomic*).

The factual similarities between *Winstar* and *Yankee Atomic* are numerous and striking. In both *Winstar* and *Yankee Atomic*:

(a) the government was engaged in commercial rather than sovereign activities;

(b) the government made explicit commitments to the private entities with whom they were doing business as inducements to enter into contracts, in *Winstar* to recognize supervisory goodwill in post-merger capitalization, and in *Yankee Atomic* to provide uranium enrichment services on a fixed price basis;

(c) the government breached its commitments through subsequently enacted legislation, in the Finan-

cial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") to proscribe supervisory goodwill, and in the Energy Policy Act of 1992 to impose special assessments on past domestic utility purchasers of DOE uranium enrichment services in excess of the fixed prices specified in the enrichment contracts, and derived in exact proportion to each utility's past uranium enrichment service purchases;

(d) implementation of FIRREA in *Winstar*, and the Act in *Yankee Atomic*, is incompatible with the supervisory goodwill and fixed-price provisions, respectively, of the government's contractual promises to its trading partners in each case;

(e) the contracts in *Winstar* assigned to the government the business risks of subsequent changes in rules pertaining to the accounting treatment of supervisory goodwill, and the contracts in *Yankee Atomic* assigned to the government the business risks of covering all of the costs associated with its sales of services, including enrichment facility retirement costs;

(f) the necessary consequence of implementation of the two intervening statutory schemes was to deprive the party in contract with the government of the essential features of its bargain;

(g) in both instances the financial impact of the subsequently enacted legislation fell disproportionately if not entirely on those parties who had previously entered in good faith into commercial contracts with the government;

(h) in both instances the direct financial consequences of the government's subsequent actions were substantial, severe, and in some instances potentially

calamitous to the private parties in contract with the government;

(i) the government's trading partners did not dispute, respectively, the government's authority to prospectively regulate utilization of supervisory goodwill in post-merger accounting, or to generate funds for the future plant retirement costs associated with provision of enrichment services, but contended merely that they were entitled to damages for the bargained-for contractual entitlements of which they were being deprived, supervisory goodwill and an all-inclusive stated contract price, respectively; and

(j) in both instances the government invoked the sovereign acts and unmistakability doctrines in an attempt to utilize the subsequently enacted legislation to defeat the damage claims of the parties in contract with the government.

However, despite these numerous and cumulative similarities between *Winstar* and *Yankee Atomic*, the result in *Winstar* is starkly different from the result in *Yankee Atomic*, to such an extent that the decision in *Yankee Atomic* is incompatible with the principles of law articulated in *Winstar*. This in turn creates confusion and lack of clarity as to the responsibilities of the government when it acts in a purely commercial manner and the consequences of subsequent legislation, as well as the rights and remedies of private parties entering into commercial transactions with the government.

The Federal Circuit's decision in *Yankee Atomic* fails to adhere to or apply the principles of *Winstar* in the following respects:

(a) in *Winstar*, whether damage claims properly lie from subsequent legislative enactments affecting

preexisting commercial arrangements to which the government was a party is inferred from the direct consequences of the subsequent legislation to the commercial setting, whereas the panel decision in *Yankee Atomic* requires attribution to Congress of an ill motive or purpose to target and vitiate commercial arrangements when enacting legislation;

(b) in *Winstar*, the contractual provisions regarding future accounting for supervisory goodwill were found to be essential features of the commercial transactions to which the government was a party, whereas the panel decision in *Yankee Atomic* treats recovery of the government's future costs in providing uranium enrichment services as entirely distinct from the price it charged its customers under fixed-price contracts to perform such services;

(c) *Winstar* instructs that in seeking to recover business losses associated with subsequent statutory modification of the accounting treatment specified in their contracts with the government the claimants were not presumed to be challenging the government's sovereign authority to legislate accounting rules, whereas in *Yankee Atomic* an effort by the party in contract with the government to enforce the contract's fixed-price provisions was deemed to necessarily interfere with the government's future taxing authority;

(d) In *Winstar*. the plurality decision found that the unmistakability doctrine was not applicable because enforcement of the accounting treatment obligation in question did not preclude the government from subsequently exercising its sovereign powers, whereas in *Yankee Atomic* an attempt to have the price term of the contract recognized as a risk alloca-

tion device was deemed to effectively block the sovereign power to tax;

(e) under *Winstar*, to the extent that concurring Justices found the unmistakability doctrine relevant, an unmistakable promise to preserve the accounting treatment of supervisory goodwill was inferred from the context of the commercial transactions to which the government was a party, whereas the panel decision in *Yankee Atomic* would require that there have been an explicit provision in decades old fixed-price uranium enrichment contracts to the effect that purchasers of enrichment services would not be subject to post-performance price increases achieved through subsequent special assessments;

(f) in *Winstar*, the government, acting in its commercial capacity, was found to have assumed full liability for the risk that accounting practices pertaining to supervisory goodwill might subsequently change, whereas the panel decision in *Yankee Atomic* denies that the government, also acting in its commercial capacity, should be held responsible for the risk that its actual contract performance costs might be higher than the fixed contract price; and

(g) the government's entitlement to invoke the sovereign acts doctrine in situations where it might be appropriate to do so was confined by *Winstar* to situations where the act was a "public and general act," whereas the panel decision in *Yankee Atomic* found the doctrine to be available as a defense to damage liability even though the subsequent special assessment was designed to fall directly and exclusively on the private parties to whom DOE had previously provided enrichment services.[3]

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[3] Moreover, the feature of the D&D fund assessments seized upon by the panel majority in *Yankee Atomic*—that the

To be sure, *Winstar* involved a series of business transactions which became non-viable after subsequent legislative changes in accounting rules, whereas *Yankee Atomic* involves an assessment program specifically targeting prior fixed-price commercial transactions. However, the similarities between *Winstar* and *Yankee Atomic* far outweigh the distinctions in a commercial context, and it should make scant difference that an assessment approach is selected by the government as the vehicle for reneging on its prior contractual commitments. If *Yankee Atomic* is not reversed, one industry which is an important trading partner of the government will be entitled to rely upon the essential feature of its bargains, whereas another industry engaged in equally significant ongoing transactions with the government will have its agreements subject to perpetual (and retrospective) jeopardy. Unless the principles of *Winstar* are determined to be applicable to the nuclear power industry, its numerous business transactions with the government could become equally as non-viable as the supervisory mergers at stake in *Winstar*.

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assessments are calculated on the basis of the extent of enrichment services actually utilized, rather than contracted for—denies the assignability feature of the original DOE enrichment contracts and imposes privity of contract requirements that were never intended by the parties. (Compare *Perry v. United States*, 294 U.S. 330 (1935), erroneously relied upon by the *Yankee Atomic* panel majority, where abrogation of assignable gold bond redemption rights was found unlawful irrespective of whether holders were original purchasers.) In the case of fixed-price uranium enrichment contracts, purchasers of secondary market enrichment services succeeded to the rights of the parties initially contracting with the government that the enrichment services were to be performed on a fixed-price basis, and that under-recovery of costs was a business risk assumed by DOE.

Winstar amply points out that the practical impact of the subsequent legislation should be determinative of whether sovereign acts and unmistakability defenses are available to the government. "So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk of allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it." 135 L.Ed.2d at 995. Here, unlike *Winstar*, the challenged portions of the Act impose assessments against the government's trading partners, and in direct proportion to the extent of their prior transactions with the government. *Winstar*, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), emphasizes that the Constitution "bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," 135 L.Ed.2d at 996.

Moreover, the assessments provided by the Act which are in issue here are no less specifically directed to the government's trading partners than was FIRREA. As *Winstar* emphasizes, "the extent to which [FIRREA] relieved the Government of its own contractual obligations precludes a finding that the statute is a 'public and general' act for purposes of the sovereign acts defense," 135 L.Ed.2d at 1009 (footnote omitted). "The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of its own improvidence. . .," 135 L.Ed.2d at 1006.

CONCLUSION

For the reasons set forth above, the Association, as *amicus curiae*, urges that a review of the Federal Circuit's decision in this case be granted both because of the exceptional importance of this case and because of the inconsistency between the Federal Circuit's decision and this Court's decision in *Winstar*.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

The National Defense Industrial Association ("Association") respectfully submits this brief as *amicus curiae* in support of the petitioner, Yankee Atomic Electric Company ("Yankee Atomic").[1]

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Association is a national organization consisting of more than 900 companies and 28,000 individual members. It is dedicated to three principal endeavors: First, the Association promotes awareness of the need for a strong defense posture among all elements of American society. Second, it identifies and studies problems affecting the common defense and national security of the United States. Third, the Association encourages mutual understanding and a close working relationship among American commerce and industry and those segments of the United States Government ("Government") responsible for the common defense and national security.

The Association and its members are deeply concerned about the Federal Circuit's decision in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997). This decision would permit the Government to

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1 No counsel for any party in this case authored this brief, either in whole or in part. No person or entity other than the Association has made a monetary contribution to the preparation or submission of this brief.

impose retroactive price increases on its private contracting partners decades after the completion of fixed-price contracts. Consequently, *Yankee Atomic* violates this Court's long-standing precedent, and particularly its recent decision in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996).[2]

SUMMARY OF ARGUMENT

If allowed to stand, the Federal Circuit's ruling would permit Congress to abrogate specific contractual obligations of the Government while escaping liability for breach of contract. The private sector no longer would be able to rely on the rule that the Government as contractor is subject to the same contract law principles as private parties. Until now, private contractors could have confidence that the Government cannot abuse its sovereign power to abrogate its contracts. The Federal Circuit's decision, however, sanctions such governmental manipulation. As a result, private parties now may become reluctant to contract with the Government, or at least may factor this additional risk into their contracts, thereby increasing the Government's and ultimately, the public's contracting costs.

This Court's immediate review is necessary because the Federal Circuit's opinion represents a fundamental misapplication of this Court's dictates in *Winstar*. The Federal Circuit misapplied two closely related Government defenses to breach of contract claims, both of which were the subject of *Winstar*: (1) the sovereign acts doctrine; and (2) the unmistakability doctrine. In addition, the Federal Circuit failed to recognize the possibility of a constitutional taking of Yankee Atomic's contractual rights. Unless reversed by this Court, the Federal Circuit's misapplication of these doctrines

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2 The Petitioner and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

and the lessons of *Winstar* will have a far-reaching and immediate impact not only on the utility industry, but on all businesses that contract with the Government.

Furthermore, the Government persists in misinterpreting or ignoring *Winstar* by raising the same arguments already rejected in *Winstar*. *See, e.g.*, *California Fed. Bank v. United States*, Nos. 92-138 C, 90-981 C, 95-502 C, 92-652 C, 1997 WL 780936, at *1 (Fed. Cl. Dec. 22, 1997) ("[T]he government wants to relitigate the core *Winstar* liability issues in every case."). There is no reason for the Court to defer reviewing these issues inasmuch as the Federal Circuit has exclusive jurisdiction over appeals involving monetary claims against the Government like this one and hence, an inter-circuit conflict will not arise. The Federal Circuit's profound misapplication of *Winstar* implicates this Court's supervisory authority over the lower courts to correctly apply the principles of *Winstar*.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S DECISION WILL DISCOURAGE PRIVATE PARTIES FROM CONTRACTING WITH THE GOVERNMENT

This Court should grant certiorari to review the Federal Circuit's decision in *Yankee Atomic* because that ruling jeopardizes the integrity of contracts between the Government and private parties, thereby deterring firms from contracting with the Government. The essence of the Federal Circuit's decision is that the Government, unlike private parties, can unilaterally reopen its previously closed fixed-price contracts decades after their completion and impose a retroactive price increase without any liability for breach of contract. Thus, the Federal Circuit would place the

Government and private parties on vastly unequal footing as contracting partners.

The decision would potentially render the Government untrustworthy as a contracting partner. Businesses may question the validity of the previously well-established precedent that when the Government enters into a contractual relationship, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also Winstar*, 116 S. Ct. at 2451-52.

The Federal Circuit's ruling would erase the line between legislation that is general in applicability and legislation that is "tainted by a governmental object of self-relief." *Winstar*, 116 S. Ct. at 2465. Thus, Congress could abrogate the Government's contractual obligations while avoiding any liability for breach, contrary to the law established in *Winstar*, *Perry*, *Lynch*, and *Horowitz*. *See Winstar*, 116 S. Ct. at 2453; *Perry v. United States*, 294 U.S. 330, 341 (1935); *Lynch*, 292 U.S. at 579; *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Those cases recognize the Government's dual capacities as a legislator and as a contractor. *See Horowitz*, 267 U.S. at 461. When acting as a legislator, the Government passes laws that affect the public in general, and such acts are not attributable to the Government as contractor for purposes of breach of contract liability. When the Government passes legislation with the effect of abrogating certain Government contracts, however, the Government as contractor becomes liable for breach. *See Winstar*, 116 S. Ct. at 2464-66 (citing *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865)); *Horowitz*, 267 U.S. at 461.

In the instant case, Yankee Atomic's contract with the Government contained simple fixed-price terms, thereby shifting the risk of any increased costs from Yankee Atomic

as buyer to the Government as seller. Typically, "[w]hen parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the *seller bears the risk* that its costs will exceed that ceiling." *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1402 (9th Cir. 1993) (emphasis added). Moreover, the risk of increased costs was foreseeable here because this case involves a highly regulated industry with potentially high clean-up costs. "Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." *Winstar*, 116 S. Ct. at 2452. When the Government demanded that its previous contracting partners bear an additional share of the decontamination and decommissioning costs of its uranium enrichment plants, it failed to honor its assumption of the risk of any increase in such costs, and thereby breached its fixed-price contracts.

Pursuant to *Winstar*, the Federal Circuit should have held that the Government breached the express fixed-price term in the contract, just as the Government in *Winstar* breached the express accounting arrangements between the Government and the acquiring institutions. *See id.* Under *Yankee Atomic*, however, the Government would be able to enact laws that have the effect of relieving the Government of its duty in fixed-price contracts to absorb the risk of increased costs as long as the legislation "appears" to be of general applicability, even if it actually is not.

The Federal Circuit improperly concluded that the Government did not breach its contract with Yankee Atomic, and wrongly characterized the Energy Policy Act of 1992

("Energy Act") as a public and general act of the sovereign.[3] The special assessment in the Energy Act, *see* 42 U.S.C. § 2297g-2(c) (1994), in effect focuses very narrowly on one group of contractors. This case involves the issue of how specifically aimed at a particular contract legislation must be to lose its characterization as a public and general act. Once it loses this characterization, the Government as contractor becomes liable for breach. The Government may also be liable even for its public and general acts if there is an "unmistakable" term in the contract which provides for such liability. The characterization of this legislation as a public and general act would compromise the Government's practical capacity to contract, as private parties would no longer be able to rely on the Government to honor its contractual obligations. *See Winstar*, 116 S. Ct. at 2459.

Congress certainly has the right as the sovereign to legislate for the benefit of the public at large. When legislation has the effect of abrogating specific Government contract rights, however, the Government is liable for breach unless the private contracting party has assumed the risk of such future legislation. Yankee Atomic did not assume that risk due to the nature of its fixed-price contract.

As in *Winstar*, it would "have been madness" for Yankee Atomic to have purchased uranium enrichment services from the Government knowing that the Government could later return to Yankee Atomic following the contract's completion and demand more money. *Id.* at 2472. Indeed, if

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3 As will be explained in Part II.A, the sovereign acts doctrine encompasses the idea of a "public and general act of the sovereign." The very name "sovereign acts doctrine" perhaps has contributed to the Federal Circuit's confusion in this area. Indeed, all legislative acts are "sovereign acts." For purposes of the doctrine, however, only acts that are "public and general" may be attributed to the Government as legislator.

the Federal Circuit's decision is allowed to stand, it would be madness for any private company to enter into a fixed-price contract with the Government for services. A promise to charge a fixed-price, "with a reserved right to deny or change the effect of the promise, is an absurdity." *Id.* at 2473 (Breyer, J., concurring) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

Ultimately, the Federal Circuit's ruling could produce the untoward result of increasing the Government's long-term contractual costs. The private sector's lack of trust in the Government as contractor would create additional risks in contracting with the Government. Increased risks typically cause an increase in price. Private contractors could respond to the added uncertainty that the Government can impose a price change after the contract's completion by calculating such risk into the price of their contracts, thus increasing governmental contracting costs. Considering the enormous number of contracts into which the Government enters, the magnitude of the Federal Circuit's decision ultimately could be an immense cost to both the Government and the public. This Court should review the Federal Circuit's decision in *Yankee Atomic* to restore the public's confidence in the Government's contracts.

II. THE FEDERAL CIRCUIT'S DECISION VIOLATES THIS COURT'S DICTATES IN *WINSTAR*

The *Yankee Atomic* decision illustrates the Federal Circuit's fundamental misunderstanding of this Court's landmark opinion in *Winstar*, 116 S. Ct. 2432. The Federal Circuit misinterprets and misapplies two special defenses exclusively available to the Government which, if applicable, render the Government free of liability for breach of contract: (1) "the principle that a Government's sovereign acts do not give rise to a claim for breach of contract"; and (2) "the

canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms." *Winstar*, 116 S. Ct. at 2448. In the instant case, these doctrines do not shield the Government from liability for breach of contract because the sovereign acts defense is inapplicable, and the question of whether the unmistakability doctrine applies is not reached.

The Federal Circuit, however, improperly applied these two defenses and concluded that the Government did not breach its contract with Yankee Atomic. The court of appeals ignored *Winstar* by determining that the special assessment imposed upon Yankee Atomic to help fund the Government's previously underestimated decontamination and decommissioning costs was general legislation. In reaching this conclusion, the Federal Circuit erred in two significant respects. First, the court improperly determined that the sovereign acts doctrine applies here because Congress enacted the special assessment for the benefit of the public. *Yankee Atomic*, 112 F.3d at 1577. Second, the court incorrectly decided that the unmistakability doctrine applies to the instant case. *Id.* at 1579. The Federal Circuit's conclusions are in direct conflict with *Winstar*, and warrants this Court's review.

Furthermore, the Federal Circuit improperly concluded that this is not a breach of contract case. The court concluded in a footnote that Yankee Atomic's contract rights no longer exist due to the contract's completion, and as such, this case does not entail a breach of contract. *See Yankee Atomic*, 112 F.3d at 1573 n.2. Contract rights *never cease to exist*, however; accordingly, this case does involve a breach. *See Perry*, 294 U.S. 330; *Lynch*, 292 U.S. 571. Courts can still apply contract principles to cases like this one despite the fact that the contracts are no longer executory.

A. The Sovereign Acts Defense Is Unavailable To The Government In This Case Because The Special Assessment Is Not A Public And General Act.

The sovereign acts doctrine balances the Government's need for freedom to legislate with its obligations to its contracting partners. *See Winstar*, 116 S. Ct. at 2465.

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.

Horowitz, 267 U.S. at 461. In sum, "[t]he United States as a contractor are not responsible for the United States as a lawgiver." *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865). The Federal Circuit, although facially acknowledging this difference, wrongly fused together these two "characters" of the Government, resulting in a misapplication of this Court's long-standing precedent. *Horowitz*, 267 U.S. at 461.

Not all regulatory action falls within the scope of the sovereign acts doctrine. *See Winstar*, 116 S. Ct. at 2465-66. The Government simply cannot conclude that "a given contractual commitment was no longer in the public interest" and, accordingly, seek to relieve itself of that particular commitment. Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 480, 520 (1997) (internal quotations and citations omitted). The proper inquiry is whether the act is attributable to the Government as contractor or to the Government as sovereign. *See Horowitz*,

267 U.S. at 461. Governmental acts remain those of the sovereign if they are "public and general." *Id.* All other acts are thus attributable to the Government as contractor, for which it can be held liable for breach of contract if the acts obstruct the performance of a particular contract. *See id.* This question is not necessarily answered by a statement of intent by Congress or by a search for *any* impact outside the particular group of the Government's contracting partners. Rather, the court must ascertain whether the primary impact of the legislation falls on a particular group of private contractors.

The Federal Circuit improperly focused on "purpose" rather than on "impact." *See Yankee Atomic*, 112 F.3d at 1576-77.

> Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's *impact* nonetheless falls substantially upon the Government's contracting partners.

Winstar, 116 S. Ct. at 2468 (emphasis added). If a legislative statement of purpose is the determinative factor under the sovereign acts doctrine analysis, then Congress could always cover its breaches by remaining silent.

In the instant case, despite any stated purpose of the special assessment in the Energy Act, its impact falls substantially on the Government's contracting partners who purchased uranium enrichment services. Therefore, this case does not involve public and general legislation.[4] It is

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4 Congress knows how to pass general tax legislation to raise revenues. The Internal Revenue Code amply demonstrates this fact. In an attempt to recover clean-up costs, however, Congress failed to pass general legislation here. *(Footnote continued on next page)*

immaterial that the legislation does not exclusively identify particular contracting partners of the Government. The special assessment contained in the Energy Act not only obstructs, but essentially nullifies, the fixed-price term of the Government's contract with Yankee Atomic. Consequently, the assessment is attributable to the Government as contractor, making it liable for breach of contract.

The Government's evident self-interest in the special assessment further demonstrates the Government's breach in this case.

> The greater the Government's self-interest . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable.

Winstar, 116 S. Ct. at 2466. The Government has displayed "self-interest" here by shifting its financial burden of the decontamination and decommissioning costs from the public's responsibility to Yankee Atomic and other similarly situated private contracting parties. Thus, the special assessment has the "substantial effect" of releasing the Government from its contractual obligation to maintain the

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(Footnote continued from previous page)

While the Energy Act allows the power companies to pass on the metered fees for the decontamination and decommissioning costs, the power companies may be unable to pass on those fees to consumers. For example, companies like Yankee Atomic cannot forward the fees to its rate base because it is out of the nuclear power business altogether.

fixed-price term of the contract, and is not merely incidental to a broad governmental objective. *See Winstar*, 116 S. Ct. at 2466; *Horowitz*, 267 U.S. at 461.

Congress purposefully and outrageously abrogated specific Government contracts, an act which the Federal Circuit erroneously approved. The special assessment's retroactive price increase constitutes a breach of contract, as in *Winstar*, and the fact that the contract is no longer executory is irrelevant. The Federal Circuit profoundly misapplied this Court's dictates of *Winstar* to reach an invalid conclusion in this case. It is important to all private parties who contract with the Government that this Court grant certiorari in this case to correct the Federal Circuit's misinterpretation of *Winstar*.

B. The Federal Circuit Improperly Held That The Unmistakability Doctrine Applies To This Case

The sovereign power of the Government generally prohibits its agents from contracting away the Government's ability to regulate in the future. *See Winstar*, 116 S. Ct. at 2451-53; *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986) (hereinafter referred to as *"POSSE"*). This sovereign power "governs *all* contracts subject to the sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms*." *POSSE*, 477 U.S. at 52 (emphasis added). Without such an express promise, the sovereign power endures, even though unexercised. *See id.* Consequently, any public and general sovereign acts of the Government do not violate its contracts with private parties.[5] *See Horowitz*, 267 U.S. at 461. Thus,

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5 This concept of "public and general" acts personifies the sovereign acts doctrine, as previously discussed in Part II.A. There is significant overlap

(Footnote continued on next page)

absent an "unmistakable" provision to the contrary, "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." *See Winstar*, 116 S. Ct. at 2456 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)).

> The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.

Id. at 2458 (quoting *Amino Bros. Co. v. United States*, 178 Ct. Cl. 515, 525, 372 F.2d 485, 491 (1967)). Thus, a contract provision cannot provide a basis for an injunction without "unmistakable terms", but the parties can contractually provide for the risk of future legislation. *See id.* at 2453 (unmistakability doctrine only applies where injunctive relief is sought).

Here, it was unnecessary for the Federal Circuit to reach the question of whether the unmistakability doctrine applies. The unmistakability doctrine only comes into play where the legislation in question constitutes a public and general act, and the legislation in the instant case is not a public and general act of the sovereign. In this regard, the unmistakability doctrine is a rule of contract interpretation used to ascertain the intent of the parties. *See Winstar*, 116 S.

(Footnote continued from previous page)
between the two doctrines, to which this Court alluded in its various *Winstar* opinions. *See, e.g.*, *Winstar*, 116 S. Ct. at 2478 (Scalia, J., concurring). A grant of certiorari would give this Court the opportunity to clarify this relationship between the two defenses, and, more broadly, to clarify *Winstar* itself. The multiple opinions, including two concurrences and one dissent, may have contributed to the Federal Circuit's confusion.

Ct. at 2448; *id.* at 2477 (Scalia, J., concurring); *see also California Fed. Bank*, 1997 WL 780936, at *11 (following *Winstar*). The court must first determine whether the contract purports to prohibit public and general legislation. The court then must ascertain what the contract provides, either expressly or impliedly, regarding the effect of public and general acts on the contracting parties. As previously explained in Part II.A., a retroactive price increase having a substantial effect on specific contracting parties is not a public and general act, as would be, for example, an increase in the income tax or a minimum wage statute. Therefore, in this case there is no need to determine whether the Government contracted away its ability to legislate in the future. Rather, the analysis ends with the determination that the special assessment contained in the Energy Act is not a public and general act.

Perhaps a simple illustration will clarify the interrelationship between the two doctrines. Suppose a contractor agrees to provide a product to the Government for a fixed-price of $1,000. During performance of the contract, Congress passes a law that increases the minimum wage, which applies to all employers and employees throughout the United States. Such legislation would constitute a public and general act, and would be attributable to the Government as legislator rather than to the Government as contractor. The Government as buyer would not have to pay a higher price because the private contractor, as the seller, had assumed the risk of any cost increases. *See Winstar*, 116 S. Ct. at 2456 (sovereign power governs all contracts subject to sovereign's jurisdiction).

The private contractor could have protected itself against the risk of increased costs occasioned by a public and general act in various ways. One way would have been to include in the contract an "unmistakable" provision that in

the event of a change in the minimum wage law, the contract price would be altered accordingly. *See id.* Such a provision would not affect the ability of Congress to legislate generally, but rather would address specifically the allocation of the risk of increased costs. However, absent a public and general act, the unmistakability provision is not reached. There is no need to determine the intent of the parties regarding an event that did not occur.

Even if there is a public and general act, it is not necessary to look for an unmistakable term if the contract impliedly addresses the issue. *See id.* at 2474 (Breyer, J., concurring). Had the contract in the example been a cost reimbursement contract, the buyer would pay the increased labor costs, not because of a second unmistakable contract term, but rather because the risk of increased costs impliedly had been assumed by the buyer by the nature of the contract. There is no need for an additional "unmistakable" provision expressly stating what the contract already impliedly addresses.

In the instant case, a second unmistakable provision was not necessary because the contract impliedly addresses the issue. The contract was for a fixed-price, which assured Yankee Atomic that the price it paid to the Government for acquiring services would not change. This guarantee does not *preclude* public and general acts, but instead leaves the Government liable for such acts.

Yankee Atomic's contract did not need an unmistakable provision covering future legislation that effectively increases contractual costs. The fixed-price term already allocated this risk to the Government. Consequently, the Government must absorb its previously underestimated costs. Ultimately, then, the Federal Circuit did not need to look for an "unmistakable term."

Even if the question of unmistakability were reached, the doctrine does not apply here. The Federal Circuit improperly held that the unmistakability doctrine applies, and wrongly expanded the scope of that doctrine beyond both the plurality and concurrences of *Winstar*. The court of appeals apparently erroneously determined that honoring the fixed-price term in Yankee Atomic's contract effectively would enjoin the Government's ability to legislate in the future when it stated that the "unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government." *Yankee Atomic*, 112 F.3d at 1579. From that faulty premise, the Federal Circuit concluded that the contract needed a second promise that the Government will compensate the contractor for the actions of Congress that effect price. The fixed-price term does not prohibit Congress from enacting public and general legislation. Therefore, there is no need for a second promise because the fixed-price term implies such a promise.

Under *Winstar*, the mere payment of costs by the Government does not limit the Government's ability to legislate. The Federal Circuit misapplied the law of *Winstar*, wherein both the plurality and concurring justices agreed that the unmistakability doctrine does not apply where the contract provides for the risk. *See Winstar*, 116 S. Ct. at 2453; *id.* at 2474 (Breyer, J., concurring). The Federal Circuit's misapplication and expansion of *Winstar* mandates this Court's review.

III. EVEN IF THE GOVERNMENT'S RETROACTIVE PRICE INCREASE DOES NOT CONSTITUTE A BREACH OF CONTRACT, THE GOVERNMENT MUST NEVERTHELESS PAY JUST COMPENSATION PURSUANT TO THE FIFTH AMENDMENT'S TAKINGS CLAUSE

The Government's sovereign power to abrogate its contractual obligations is constitutionally limited by the Due Process and Takings Clauses.[6] Thus, any uncompensated breaches of contract may nevertheless require compensation pursuant to the Fifth Amendment. *See Perry v. United States*, 294 U.S. 330 (1935).[7] This Court should grant Yankee Atomic's petition because the Federal Circuit failed to recognize that there may be a Fifth Amendment taking in this case. *See Yankee Atomic*, 112 F.3d at 1580 n.8.

By contracting with a private party, the Government creates property rights which it cannot take for public use

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6 U.S. CONST. AMEND. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.").

7 When a breach of a Government contract arises, the private contractor may seek judicial review. *See* 28 U.S.C. §§ 1346, 1491 (1994); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 n.5 (1980). In those rare cases in which there is no relief under the law for a breach of contract, the contractor may pursue just compensation under the Fifth Amendment due to the loss of its contractual rights obtained as a result of its contract with the Government. *See* U.S. CONST. AMEND. V; 28 U.S.C. §§ 1346(a)(2), 1491; *Narramore v. United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992). When a plaintiff presents alternative theories of recovery based on a breach of contract claim and takings rights under the Fifth Amendment, recovery on the breach of contract claim precludes recovery on the takings theory. *See Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769, 572 F.2d 786, 817-18 (1978). However, when no action lies in contract, the Fifth Amendment may provide relief. *Cf. Wah Chang Corp. v. United States*, 282 F.2d 728 (Ct. Cl. 1960).

without just compensation. *See* U.S. CONST. AMEND. V; *Perry*, 294 U.S. 330. If the Government, after entering into a contract, subsequently alters its contractual obligations, it thereby takes the property of a private party. *See* U.S. CONST. AMEND. V. Such action is compensable to the property owner even where it would relieve the Government of significant financial burdens. *See Lynch*, 292 U.S. 571; *Perry*, 294 U.S. 330. The mere necessity for Government action does not provide the Government with the power to take such action without just compensation.

Here, the apparent purpose of imposing the special assessment was to ease the Government's financial burden which resulted from the clean-up costs of its uranium enrichment plants. While the special assessment may benefit the public as a whole by relieving a financial burden of the Government, the special assessment nevertheless takes property from private individuals. Specifically, the Government has taken Yankee Atomic's contractual rights, thereby requiring just compensation from the Government.

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 103 (Gaillard Hunt ed., 1906), *quoted in Winstar v. United States*, 25 Cl. Ct. 541, 553 (1992).

IV. THIS COURT SHOULD NOT DELAY REVIEWING THIS CASE

The Federal Circuit has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims concerning claims for monetary damages against the Government not sounding in tort. *See* 28 U.S.C. § 1295 (1994).[8] Accordingly, it would be futile for this Court to wait for an inter-circuit conflict to arise before addressing the issues presented in Yankee Atomic's petition for certiorari.

The Federal Circuit's decision necessitates the invocation of this Court's supervisory powers over the lower courts. The consequences of *Yankee Atomic* will be severe and far-reaching unless this Court immediately addresses the Federal Circuit's fundamental misinterpretation of this Court's dictates in *Winstar*. There are three primary groups of cases that *Yankee Atomic* will affect. The first group involves companies similarly situated to Yankee Atomic. As the *amicus curiae* brief for the several electric utility companies notes, at least twenty one cases have been filed in the Court of Federal Claims, and most have been stayed pending the outcome of this case. *See Brief in Support of Petitioner Filed by 31 Electric Utilities as Amici Curiae*. The second group consists of numerous *Winstar* progeny

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8 The Tucker Act, 28 U.S.C. §§ 1346, 1491, vests exclusive jurisdiction in the United States Court of Federal Claims to hear monetary claims over $10,000 against the United States founded either upon a contract or upon a provision of "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1491, that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 217 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); *see also Opal Mfg. Co. v. UMC Indus., Inc.*, 553 F. Supp. 131 (D.D.C. 1982) (jurisdiction is vested in Court of Federal Claims to exclusion of district courts). Thus, the Tucker Act constitutes a waiver of the Government's sovereign immunity from suit of the types of claims outlined in the Tucker Act. *See Mitchell*, 463 U.S. at 218.

cases. *See, e.g., California Fed. Bank*, 1997 WL 780936. The third group includes all other cases in which the Government has legislated to the detriment of its contracting partners.

If the Federal Circuit's *Yankee Atomic* decision is allowed to stand, the Court of Federal Claims, insofar as it cannot distinguish *Yankee Atomic*, will be compelled to apply the Federal Circuit's improper analysis to each future Government contract case, resulting in an unjust and costly outcome for each private contractor. Consequently, it is vital that this Court grant certiorari to immediately reaffirm *Winstar* and ensure that the lower courts apply it properly.

CONCLUSION

For the reasons stated above, the Association respectfully urges the Court to grant Yankee Atomic's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 97-801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The parent companies of Petitioner Yankee Atomic Electric Company are:

New England Power Company
The Connecticut Light and Power Company
Boston Edison Company
Central Maine Power Company
Public Service Company of New Hampshire
Western Massachusetts Electric Company
Montaup Electric Company
Central Vermont Public Service Corporation
Commonwealth Electric Company
Cambridge Electric Light Company

Petitioner has no subsidiaries.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

Strikingly, the government in its opposition brief does not even attempt to defend the fundamental rule of law applied by the Federal Circuit panel majority. The government does not claim that a statute falling predominantly (at least 85%) on the government's contracting partners *should* properly be considered a "public and general" law that—under the "sovereign acts" doctrine—exonerates the government from contract liability. Instead, the government urges the Court to avoid reviewing the important questions presented in this case for a variety of reasons unrelated to the Federal Circuit's extraordinary holding.

None of the government's arguments has merit, and they all are essentially beside the point. As the government implicitly acknowledges by its silence on the issue, the basic rule of law applied by the court below is completely indefensible—a statute that targets and hits the overwhelming majority of the government's contracting partners, as the Energy Policy Act's special assessment concededly does, *see* Pet. App. 29a, is simply *not* a "public and general" act. The narrowness of the law means, in turn, that the government cannot claim either that the additional cost burdens imposed on its contracting partners are an "incidental" effect of the statute or that, in the absence of an unmistakable promise to the contrary, the parties must have contemplated this possible exercise of governmental power. Further review is therefore warranted to address these important issues, as well as the similarly compelling due process question presented by the Federal Circuit's holding that the 30-year retroactive cost-shifting effected by this statutory assessment is justified *solely* by utilities' prior purchase of government enrichment services.

1. The government first contends that review is unnecessary because the contracts between Petitioner Yankee and the government have already been fully performed, and therefore this case involves no remaining contract-based claims. (Gov't Opp. at 7-8.) But the fact that the government has already provided the contractual enrichment services does not end the contract analysis. The critical point here is that Yankee also has fully performed—it has already paid the contractually-specified fixed prices. That prior full payment by Yankee is *precisely* what now prevents the government from collecting "more price" from Yankee. The government's attempt to shift its costs onto Yankee, in spite of Yankee's prior full payment, violates the contractual fixed-price terms. *See United States v. Spearin*, 248 U.S. 132, 136 (1918) ("Where one [by contract] agrees to do, for a fixed sum, a thing possible to be performed, he will not

. . . become entitled to additional compensation because unforeseen difficulties are encountered."); *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 619 (1942) (statutory special assessment imposed on prior contractors with government "was not a general tax" but rather "a clear violation of the obligation of the contracts").[1]

It seems clear, therefore, that the government would have had no lawful basis for simply insisting that purchasers of enrichment services pay more than the contractually-specified prices to defray the government's additional costs. It is only the power of the government to act unilaterally by legislation that puts its contracting partners in the position of being compelled to pay again. Whether that exercise of power is consistent with the government's prior contractual dealings turns—as all the judges below acknowledged—on the applicability of the sovereign acts and unmistakability doctrines. And it is the serious distortion of those doctrines by the panel majority below that requires further review.

2. The government asserts that the Federal Circuit "correctly" applied the sovereign acts and unmistakability doctrines. (Gov't Opp. at 8-9.) But the government's treatment of these doctrines is wholly conclusory, and fails to confront the serious and troubling issues raised in Yankee's petition. Ultimately, the government's discussion of sovereign acts and unmistakability reflects the same

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[1] If the government had instituted a tax enforcement action, and Yankee had defended by asserting prior payment under its fixed-price contracts, the government could not plausibly deny that the case involved contract-based claims. That this action was instituted by Yankee, not the government, cannot prevent the very same contract-based rights from being asserted—and recognized—here. The cases cited by the government, and mentioned by the dissent below, are not to the contrary. *See John J. Kirlin, Inc. v. United States*, 827 F.2d 1538 (Fed. Cir. 1987) (applying clause in contract requiring action prior to contract completion); *Mulholland v. United States*, 361 F.2d 237 (Ct. Cl. 1966) (involving statute of limitations accrual date).

profound confusion that is evident in the decision below, thus underscoring the need—and the opportunity this case presents—to clarify and reconfirm the principles set forth by the Court in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996).[2]

a. With respect to the sovereign acts doctrine, as stated above the government cannot (and does not) defend the Federal Circuit's holding that a statute whose impact falls predominantly (at least 85%) on the government's contracting partners is nevertheless the kind of "public and general" act for which the government is immune from contract liability. Nor does the government address, let alone refute, Yankee's showing in the petition, (Pet. at 13), that the Federal Circuit's holding in this regard conflicts with decisions of this Court that predate *Winstar*. The government does suggest, though it fails to state directly, that the Federal Circuit's treatment of the sovereign acts doctrine is consistent with *Winstar*. In support the government suggests, again only implicitly, that application of the sovereign acts doctrine turns on congressional purpose. The government thus asserts that there is no evidence, in this case, that "Congress intended to alter the terms of petitioner's contracts." (Gov't Opp. at 9.)

Congressional purpose, however, is not only the wrong issue here, as Yankee explained in the petition, (Pet. at 10), it is also a false issue. Yankee *acknowledges* that the purpose of the special assessment is to obtain funds to clean up the government's enrichment plants, and further acknowledges that this is a laudable undertaking. But those conclusions are not inconsistent with the fact

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[2] For further discussion of the numerous inconsistencies between this Court's decision in *Winstar* and the Federal Circuit's decision below, *see* Brief as Amicus Curiae of the Committee on Energy of the Association of the Bar of the City of New York in Support of Petitioner *and* Brief Amicus Curiae of the National Defense Industrial Association in Support of Petitioner.

that the effect of the special assessment is to impose added burdens *predominantly* on the government's contracting partners. It is this latter fact that makes the assessment a non-general governmental act and precludes application of the sovereign acts defense—regardless of Congress' reasons for acting. (*See also* Pet. at 11-12) (explaining that application of sovereign acts defense in this case is inconsistent both with Justice Souter's "substantial impact" analysis set forth in the principal *Winstar* opinion and with the approach articulated by Justice Scalia for the concurring Justices).[3] Although the government (and the Federal Circuit) seek to separate the government's contractual and sovereign capacities, "the Government's capacities must be treated as fused when the Government acts in a non-general way." *Winstar*, 116 S. Ct. at 2467 (plurality opinion).

b. The government's treatment of the unmistakability doctrine is likewise misdirected. The government simply repeats the uncontested fact that Yankee's contracts contain no unmistakable waiver of Congress' authority to impose the special assessment. (Gov't Opp. at 10.) But as Yankee also explained in the petition, (Pet. at 13-14), unmistakable contract language is only necessary to protect government contractors against "public and general" sovereign acts. Because the special assessment here is *not* such a general sovereign act, but rather is targeted legislation that predominately affects the government's contract-

[3] Moreover, even the government must concede that Congress had multiple purposes for imposing the special assessment on past enrichment customers. Most obviously, the government sought to shift the D&D cleanup costs away from the government's new enrichment corporation. *See* Kristi Bahrenburg, *Government's Uranium Company Is Set To Take Big Step Toward Privatization*, Wall St. J., Jan. 16, 1998, § B, at 2 ("President Clinton's 1998 fiscal year budget puts expected revenue from the sale at $1.6 billion—considered a conservative estimate"). For a more extensive discussion of the logic flaws inherent in the government's (and the Federal Circuit's) focus on legislative purpose, *see* Brief of Amicus Curiae Washington Legal Foundation in Support of Petitioner at 8-12.

ing partners, the fixed-price terms of Yankee's contracts provide ample protection against the government's narrowly-focused effort to collect more price. The government's insistence on additional contract language is nothing more than a demand for a double promise, which the Court rejected in *Winstar*. *See* 116 S. Ct. at 2461 (plurality opinion); *id.* at 2478 (Scalia, J., concurring in the judgment).

c. The separate discussion of the sovereign acts doctrine and the unmistakability doctrine in the government's opposition brief makes clear that the government's confusion about these doctrines, like the Federal Circuit's confusion, springs from a failure to appreciate the relationship between them. To be sure, that relationship, which Yankee discussed in the petition, (Pet. at 11-14), is arguably obscured by the need to consult several opinions in *Winstar*. But as one commentator also recently observed, there is "substantial overlap and agreement . . . between Justice Scalia's exegesis of the unmistakability doctrine and Justice Souter's analysis of the sovereign acts doctrine" and "the key element of an approach likely to command majority support is . . . the level of generality of the governmental action that interferes with the promised performance." Joshua I. Schwartz, *Assembling Winstar: Triumph of the Idea of Congruence in Government Contracts Law?*, 26 Pub. Cont. L.J. 481, 554, 556 (1997).

This case squarely presents a question concerning the importance, in cases of this type, of the "level of generality" of the government's post-contractual actions. This case therefore provides a compelling and timely opportunity for the Court to examine, and articulate, the extent to which that factor controls the meaning of *both* the sovereign acts and the unmistakability doctrines. *See id.* at 557 ("It is inconceivable that there should be two sets of rules, operating independently of one another, to govern this vital question.").

3. The government's contention that Yankee's due process claim is not properly before this Court because Yankee "did not . . . press" the claim below, (Gov't. Opp. at 11), is also wrong, and is especially puzzling given that an entire section of Yankee's brief to the Federal Circuit was devoted to the due process issues. That section of Yankee's appellate brief was entitled "The Judgment Below, Rejecting The Government's Imposition Of The Retroactive Per-Unit Special Assessment On Yankee, Should Also Be Affirmed As A Fifth Amendment Due Process Clause Violation." Brief for Plaintiff/Cross-Appellant Yankee Atomic Electric Company at 38 (Nos. 96-5021, -5025). In text, this section of Yankee's brief below maintained that "Congress was 'without power' to . . . impos[e] the government's additional performance costs for D&D" on previous enrichment customers like Yankee. *Id.* at 39. In support of this due process argument below, Yankee mentioned both the "retroactivity" point and the "lack of requisite nexus" point articulated in Yankee's petition here. *Id.* at 39-40. The government's jurisdictional objection is, therefore, completely without merit.

On the substance of the due process issue, the government's opposition brief is again entirely conclusory. The government asserts that "Congress rationally concluded that the cost of decontaminating and decommissioning the uranium enrichment plants . . . should be shared by all of the participants in the relevant market." (Gov't Opp. at 12.) But this merely begs the relevant question of whether it *was* rational—in due process terms—for Congress to impose the 30-year retroactive special assessment based on nothing more than the utilities' prior *purchase* of government enrichment services. That is precisely the question posed in this case, and Yankee has shown that it is a substantial and important question, (Pet. at 16-19). Indeed, the Court already has before it the related question of due process retroactivity posed in *Eastern Enterprises v. Appel, cert. granted*, 118 S. Ct. 334 (1997)

(No. 97-42). Here again, the government offers no real response to Yankee's arguments.

4. The government raises two additional, miscellaneous points that warrant only brief reply. First, the government suggests that during the course of legislative debate over the Energy Policy Act, a utility trade group acquiesced in the special assessment. (Gov't Opp. at 2, 13.) But the fact that utilities may have expressed a preference for one, rather than another, method for financing the clean-up does not, and should not, prevent Yankee (or any other utility) from raising legitimate constitutional and other legal objections to the statute as enacted. To the extent utilities "accepted" the billions of dollars shifted onto them by the special assessment, the likelihood is they did so not because they desired the added liability but only because the assessment was the least objectionable of the available legislative possibilities.[4]

Second, the government points out that the Energy Policy Act imposes upon it a significant share of the D&D liability, and suggests that this somehow blunts the force of Yankee's arguments. (Gov't Opp. at 2-3, 12-13.) But this argument is a *non-sequitur*: an improper shifting of costs cannot be justified by saying that the challenged law might have shifted even more costs.[5] Moreover, the

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[4] Moreover, contrary to the government's suggestion that Yankee was one of the utilities that "accepted" the statutory special assessment, (Gov't Opp. at 2), in fact Yankee itself vigorously objected to the retroactive assessment.

[5] The government is also wrong to assert that "[p]ursuant to the Act, the government pays more than 68% of the total decontamination and decommissioning expense." (Gov't Opp. at 13.) The 68% figure assumes the maximum possible government appropriation under the Energy Policy Act, but as Yankee has explained, (Pet. at 4 n.2), actual appropriations have typically been well below the authorized maximum.

historical record is clear that the government's enrichment plants were already fully contaminated from nuclear weapons production activity prior to the commencement of commercial fuel enrichment operations. As the Department of Energy ("DOE") testified to Congress in 1992, "contamination . . . occurred during that 20-year period" when "the plants were operated . . . by the government exclusively for military purposes."[6] DOE's outside consultant likewise reported that "when commercial production began, the diffusion plants were already contaminated and the need to conduct D&D was well established."[7] That fact makes it even more inappropriate for the government now to shift to its contractual partners costs that it assumed under the fixed-price contracts and should properly bear.[8]

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For the foregoing reasons, and the reasons set forth in Yankee's petition for a writ of certiorari, the petition should be granted (or, if the Court elects not to grant plenary review in this case, Yankee's petition should be held pending the Court's disposition of *Eastern Enterprises v. Appel*, No. 97-42, (*see* Pet. at 17-18, 21 n.17)).

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[6] *Department of Energy Budget Request for Fiscal Year 1993: Oversight Hearing Before the Subcomm. on Energy and the Env't of the House Comm. on Interior and Insular Affairs*, 102nd Cong. 79 (1992) (Statement of William H. Young, Assistant Secretary for Nuclear Energy, U.S. Dep't of Energy).

[7] Martin Marietta Energy Sys., Inc., *Technical Information for Assessing Cost Responsibility for Decontamination and Decommissioning of the Gaseous Diffusion Plants* 6 (1992).

[8] For further discussion of the government's longstanding awareness of the D&D problem, and of the commercial impact of the special assessment on the deregulating utility industry, *see* Brief in Support of Petitioner Filed by Thirty-One Electric Utilities as Amici Curiae.

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